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No.

In the Supreme Court of the United States

October Term, 1982

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC.; and FERRIS PIERSON,

Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

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March 22, 1983

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QUESTION PRESENTED

Is the Michigan Agricultural Marketing and Bargaining Act in conflict with and therefore preempted by the Federal Agricultural Fair Practices Act of 1967?

PARTIES TO PROCEEDINGS BELOW

The appellants in this Court were appellants in the Michigan Supreme Court and plaintiffs in the trial court. They are:

1. Michigan Canners and Freezers Association, Inc. (now known as Michigan Food Processors Association, Inc.), a Michigan nonprofit corporation.

2. Forty-four individual and corporate members of the Michigan Canners and Freezers Association, Inc., who joined as plaintiffs at the time suit was initiated. Their names, too numerous to list in the caption, are set forth in the appendix at pages A112 through A114 and incorporated here by reference.

3. Dukesherer Farms, Inc., a Michigan corporation.

4. Ferris Pierson, an individual citizen of the State of Michigan.

The appellees in this Court were appellees in the Michigan Supreme Court and defendants in the trial court. They are:

1. The Agricultural Marketing and Bargaining Board, an administrative agency of the State of Michigan, represented below by the Michigan Attorney General.

2. Michigan Agricultural Cooperative Marketing Association, Inc., a Michigan corporation.

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THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

Appellants, plaintiffs below, appeal from a final judgment of the Supreme Court of Michigan, dated December 23, 1982, upholding the validity of the Michigan Agricultural Marketing and Bargaining Act.

REPORTED OPINIONS BELOW

The final opinion of the Michigan Supreme Court, dated December 23, 1982, has not yet been reported. That court's decision in an earlier appeal, which dealt with jurisdictional issues of state law, is reported at 397 Mich. 337, 245 N.W.2d 1 (1976).

GROUNDS FOR JURISDICTION

Appellants initiated this case by the filing of a complaint in the Michigan Circuit Court seeking injunctive and declaratory relief against the enforcement of the Michigan Agricultural Marketing and Bargaining Act, a statute of the State of Michigan. Among other averments, the complaint alleged that the state statute was unconstitutional because it was preempted by the Federal Agricultural Fair Practices Act of 1967. The trial court and the Michigan Supreme Court upheld the validity of the act on all grounds, including the ground of federal preemption. The Michigan Supreme Court issued a final judgment, see page A79, and supporting opinion, see pages A1 through A32, on December 23, 1982. No party requested a rehearing.

Appellants filed their Notice of Appeal to this Court with the Michigan Supreme Court and Circuit Court on March 8, 1983. See page A81. Appellants have docketed this appeal within ninety days of the final judgment below.

Appellants invoke the jurisdiction of this Court pursuant to Title 28 of the United States Code, Section 1257(2). The issue of the repugnancy of the state statute to the Federal Agricultural Fair Practices Act of 1967 was properly raised at each level of state court proceedings and was expressly considered and decided by the Michigan Supreme Court. See opinion, pages A4 through A17. This Court therefore has appellate jurisdiction. *See Orr* v. *Orr*, 440 U.S. 268, 274-75 (1979); *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974); *Charleston Federal Savings and Loan Association* v. *Alderson*, 324 U.S. 182, 185-86 (1945).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause, Article VI of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Federal Agricultural Fair Practices Act of 1967, Title 7, United States Code, Sections 2301-2306 (1973):

> [Set out in full in the appendix, pages A84 through A88.]

Michigan Agricultural Marketing and Bargaining Act, Act 344 of the Public Acts of 1972, Michigan Compiled Laws, Sections 290.701-.726 (Supp. 1982):

> [Set out in full in the appendix, pages A89 through A111.]

STATEMENT OF THE CASE

A. Nature of the Case

This case involves the conflicting provisions and goals of federal and state statutes regulating agricultural bargaining. Congress passed the Agricultural Fair Practices Act of 1967 (hereafter the "Federal Act") on April 16, 1968. The Federal Act seeks to accommodate the potentially conflicting interests of individual farmers, cooperatives of farmers and purchasers of farm products. It balances those interests by protecting the rights of individual farm-

ers to join together in cooperative associations, while safeguarding the rights of individual farmers to remain independent and the rights of purchasers to deal with farmers of their choice.

Four years later, the Michigan legislature enacted the Michigan Agricultural Marketing and Bargaining Act (hereafter the "Michigan Act"). The Michigan Act differs radically from the Federal Act. Rejecting the free market system adopted in the Federal Act, the Michigan Act provides for a form of compulsory unionism in the farm area. Once a cooperative representing a majority of farmers and products has been accredited under the Michigan Act, individual farmers in the unit are bound by all terms and conditions negotiated by the association, and individual negotiation is thereafter prohibited.

Because the Michigan Act stands as a clear obstacle to the accomplishment of the Federal Act's goals and purposes and because it is literally impossible to comply with both statutes, appellants began this action to declare the Michigan Act unconstitutional. Specifically, appellants challenge the following provisions of the Michigan Act: Section 4(1)(g) and 4(1)(h) [(Mich. Comp. Laws § 290.704(1)(g), (h)]; Section 10(1), the third and fifth sentences and Section 10(2), the last sentence [(Mich. Comp. Laws § 290.710)]; Section 13(1), the first and third sentences [(Mich. Comp. Laws § 290.713)].

B. Parties

Appellants include representatives of both groups directly affected by the Michigan Act: farmers (called "producers" in both acts) and processors of fruits and vegetables (called "handlers" in both acts). Michigan Canners and Freezers Association, Inc. is a nonprofit corporation having as its members processors of fruits and

vegetables. The forty-four individual members of the association are asparagus processors who joined as parties plaintiff to this action. Dukesherer Farms, Inc. is a corporation engaged in asparagus farming. Ferris Pierson is also an asparagus farmer.

Appellee Agricultural Marketing and Bargaining Board ("the Board") is an administrative agency of the State of Michigan established under section 3 of the Michigan Act. The Board was established for the purpose of administering and enforcing bargaining between producers and handlers of various agricultural commodities, including asparagus.

Appellee Michigan Agricultural Cooperative Marketing Association, Inc. ("MACMA") is a Michigan agricultural cooperative. As a cooperative association that bargains on behalf of producers, MACMA is a "handler" under the Federal Act, 7 U.S.C. § 2302(a)(3), but is not a handler under the Michigan Act, Mich. Comp. Laws § 290.702 (a), (g).

C. Proceedings Below

On January 25, 1974, the Board accredited MACMA as the sole sales and bargaining representative for all producers included in the Michigan asparagus bargaining unit, as that unit had been defined in an earlier Board order. Acting pursuant to the Michigan Act, MACMA thereafter negotiated on behalf of the bargaining unit members, including appellants Dukesherer Farms and Pierson, regarding the 1974 asparagus crop. These actions were performed over the objection of all appellants.

On March 7, 1974, appellants filed a complaint in the Ingham County Circuit Court challenging the Michigan Act and the Board's actions in connection with the asparagus bargaining unit. The complaint raised a number of

federal and state claims, including the claim that the Michigan Act was unconstitutional because it was preempted by the Federal Act.

On motion of defendants, the Circuit Court dismissed the complaint, holding that the state court of appeals had exclusive subject matter jurisdiction under state law. (See order and opinion, pages A33 through A37). Appellants thereafter unsuccessfully sought review in the Court of Appeals. (See pages A38 through A41). On January 15, 1975, the Michigan Supreme Court granted leave to appeal the dismissal and invited the parties to brief the substantive issues of constitutionality, which included the federal preemption issue. (See order, page A42).

On March 18, 1975, appellants filed their brief on appeal in the Michigan Supreme Court, preserving the following question: "1. Is the Agricultural Marketing and Bargaining Act unconstitutional because it conflicts with federal Agricultural Fair Practices Act of 1967, and is thereby preempted by such legislation?"[1] On review of the lower court dismissal, the Michigan Supreme Court reversed, holding that the Circuit Court did have subject matter jurisdiction to consider the constitutional challenges to the Michigan Act. (See opinion, pages A44 through A55). The action was remanded for the development of a factual record, made necessary by appellant's police power claim. (See opinion, page A46). The court therefore did not reach the merits of the preemption issue.

The Circuit Court conducted a non-jury trial between September 6 and September 27, 1977. Appellants again briefed and argued the preemption issue raised in

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1. Under Michigan practice, questions are preserved for appeal by their inclusion in the "Statement of Questions Involved" in an appellant's brief. Mich. Gen. Ct. R. 813.1.

this appeal. In an opinion filed February 2, 1981, the Circuit Court considered the preemption issue and held that the Federal Act did not preempt the Michigan Act. (See opinion, at pages A60 through A76).

The parties returned to the Michigan Supreme Court, pursuant to the court's reservation of appellate jurisdiction. Appellants' brief again raised the preemption issue in the "Statement of Questions Involved" and presented arguments and authorities in support of preemption. The Michigan Supreme Court considered and rejected appellants' contention, holding that the Federal Act did not create or preserve the right of individual producers or processors to bargain individually and so was not inconsistent with the Michigan Act. (See opinion, pages A4 through A17, and final judgment, pages A79 through A80.) The court also held, on a prospective basis, that future accreditations under the Michigan Act must be conducted in accordance with the notice and hearing procedure of the state administrative procedures act. This state law ruling did not affect the validity of the Michigan Act or the accreditation of the asparagus bargaining unit. This appeal involves only the question of federal preemption.

THE QUESTION PRESENTED IS SUBSTANTIAL

I. THIS APPEAL IS MERITORIOUS BECAUSE THE MICHIGAN AGRICULTURAL MARKETING AND BARGAINING ACT IS PREEMPTED BY THE FEDERAL AGRICULTURAL FAIR PRACTICES ACT OF 1967.

A. This Appeal Involves Important Issues Of Federalism And Turns Upon The Construction Of An Act Of Congress.

The preemption doctrine is rooted in the Supremacy Clause of Article VI of the United States Constitution. Because it involves the Supremacy Clause, preemption implicates our basic notions of federalism. *Community Communications Co.* v. *City of Boulder, Colo.*, 455 U.S. 40, 60 (1982) (Rehnquist, J. dissenting).

The doctrine invalidates state regulation in two distinct situations. Whenever Congress has occupied an entire field of regulation, the Supremacy Clause will be invoked to preempt all state laws on the subject matter in question. In such a case, any state regulation of the subject matter is barred, even if the state statute is harmonious with the federal enactments. *See, e.g., Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

This type of preemption is not present in this case. It is clear that the Federal Act has not completely "occupied the field". Section 2305(d) of the Federal Act provides that "existing state law" shall not be changed or modified by the Federal Act. The Federal Act thus leaves some latitude for regulation by the states.

The Michigan Act is, however, preempted under the second preemption standard. When Congress has not com-

pletely occupied a field of regulation, a state law is nevertheless preempted to the extent that it conflicts with federal law. There are two types of conflict that give rise to a finding of preemption. This Court delineated the two alternative methods for determining whether conflict preemption exists in *Fidelity Federal Savings and Loan Association* v. *De La Cuesta*, ... U.S. ....., 102 S. Ct. 3014 (1982): "Such a conflict arises when compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". *Id.* at ....., 102 S. Ct. at 3022 (citations omitted).

The Michigan Supreme Court was bound to apply these principles in deciding appellants' preemption claim. When faced with a potential conflict between federal and state laws, state courts typically resolve the conflict by giving their own law a "narrowing construction". The Michigan Supreme Court strayed from that course. It resolved the apparent conflict between the Federal Act and the Michigan Act by giving its own law a broad interpretation, while narrowly construing the Federal Act. The court accordingly held that the Federal Act did not create or protect rights of private dealing (opinion, page A8); that "Section 2304 [of the Federal Act] is nothing more than an explanation of what [the Act] was not intended to do" (*Id.*, page A8); and that there was "no intent on the part of Congress, as plaintiffs assert, to affirmatively 'strike a balance' among competing interests." (*Id.*, page A14).

The Michigan Supreme Court left no doubt that its finding of a lack of preemption rested upon a construction of the Federal Act: "Were we to agree that § 2304, or any provision in [the Federal Act], was meant to affirmatively *create* or *protect* rights of private dealing between individual producers and processors, we would agree

that [the Michigan Act] must fall because, plainly, [the Michigan Act] conflicts with that result. However, we do not find such meaning in the provisions of the federal act." (*Id.*, page A8).

As is shown below, the court's conclusion is contrary to the Federal Act's plain language, its legislative history and the decisions of the lower federal courts. This appeal therefore presents a single issue: whether a state court was correct in its restrictive interpretation of an Act of Congress. That issue is one particularly appropriate for resolution by this Court.

B. The Michigan Act Stands As An Obstacle To The Accomplishment Of The Full Objectives Of Congress As Expressed In The Federal Fair Practices Act And Is Therefore Pre-empted.

1. The Regulatory Schemes Established By The Federal And State Acts Are Fundamentally Inconsistent.

The United States Congress and the Michigan legislature have each passed legislation to protect a farmer's right to join a cooperative association, and to bargain collectively through that association. Although the Michigan and Federal statutes share one common goal, they establish regulatory schemes that are irreconcilably in conflict.

Congress chose to protect a farmer's right to bargain through an association only insofar as that right does not conflict with the rights of purchasers of farm products and the rights of individual farmers who wish to remain independent of collective bargaining associations. The Federal Act evidences three distinct goals. First, the Federal Act authorizes the formation of voluntary collective marketing associations by farmers and prohibits

discrimination against farmers on the basis of membership in such associations. 7 U.S.C. §§ 2301, 2303. Second, it protects an individual farmer's right to remain independent of a marketing association and prohibits interference with that right by processors and cooperative associations. 7 U.S.C. §§ 2301, 2303. Finally, the Federal Act protects the right of purchasers of farm commodities to deal freely with the customers of their choice. 7 U.S.C. § 2304.

Congress passed the Federal Fair Practices Act after four years of intense debate and substantial restructuring of the original bill. Congress considered the various alternative systems of regulation and chose to strike a careful balance among the potentially conflicting interests of individual farmers and purchasers as well as cooperative associations, while preserving the free competition that is a cornerstone of the American economic system. Two federal district courts have therefore stated that the act is the product of "conflicting interests and intent". *Garrison* v. *Dairymen, Inc.*, Civ. Action No. 80-1080-3, slip op. (D.S.C. July 28, 1980); *Butz* v. *Lawson Milk Co.*, 386 F. Supp. 227, 234 (N.D. Ohio 1974).

In 1972, four years after the passage of the Federal Act, the Michigan Legislature passed the Michigan Agricultural Marketing and Bargaining Act. The Michigan Act protects the rights of farmers who wish to join cooperatives, but completely eliminates the rights of individual farmers and purchasers to deal directly with each other. Instead, the Michigan Act replaces the free market system established by the Federal Act with a closed union shop.

There is no question concerning the meaning or effect of the Michigan Act, since it has been authoritatively construed by the state supreme court. As interpreted by the state court, the act allows accreditation of a cooperative association representing a majority of producers

who produce a majority of a certain crop, such as asparagus. Once accredited, that association becomes the exclusive bargaining agent for all Michigan asparagus growers in the defined unit. Mich. Comp. Laws §§ 290.710, 713. Those asparagus growers who do not wish to join the association are nevertheless bound by all of the terms and conditions of the association's contracts with asparagus purchasers, and must help support the association by paying a service fee. Mich. Comp. Laws § 290.710. The Michigan Act makes it unlawful for an asparagus purchaser to negotiate or contract directly with an asparagus farmer who is included in such a bargaining unit, even if that farmer has chosen not to join the association. Mich. Comp. Laws § 290.704(1)(g). Additionally, a purchaser *must* bargain with an accredited association if it has had prior substantial dealings with the association or its members. Mich. Comp. Laws § 290.704(1)(h). (See opinion, pages A6 through A7).

The provisions of the Michigan Act cited above are in irreconcilable conflict with the Federal Act. They eliminate a purchaser's federal right to deal directly with a farmer, and the farmer's concomitant right to sell his crops independent of an association. As shown below, the Michigan legislature's substitution of a compulsory union system for the free market system prescribed by Congress overrules the careful balance struck by Congress in the Federal Act.

(a) The Federal Act Protects An Individual Farmer's Right Not To Join Or To Bargain Through A Cooperative, And The Michigan Act Destroys This Right.

Section 2301 of the Federal Act states the Congressional policy that farmers should be "free to join together *voluntarily* in cooperative organizations as authorized by

law" (emphasis added). At the same time, Section 2303 (a) gives producers the "*right* to join and belong or *to refrain from joining or belonging* to an association of producers" and protects that right from interference by "handlers" (emphasis added). As recognized by the lower federal courts, the statutory definition of handler includes cooperative associations themselves. 7 U.S.C. § 2302(a)(3); *Butz* v. *Lawson Milk Co.*, 386 F. Supp. 227, 235 (N.D. Ohio 1974); *Marketing Assistance Plan, Inc.* v. *Associated Milk Producers, Inc.*, 338 F. Supp. 1019, 1124 (S.D. Tex. 1972). Congress thus consciously sought to protect the right of farmers to remain independent of cooperative associations and prohibited interference with that right by cooperatives themselves. *See* S. Rep. No. 474, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1870.

The Federal Act's legislative history demonstrates that Section 2303(a) means what it says: Congress intended to preserve a farmer's right to deal either individually or through a cooperative. The report of the Senate Committee on Agriculture and Forestry makes this point clear: "This bill is designed *to protect* the agricultural producer's *right* to decide, free from improper pressures, whether or not he wishes to belong to a marketing or bargaining association." S. Rep. No. 474, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1867 (emphasis added). As Senator Williams observed during the Senate Subcommittee hearings, the "freedom of choice of any farmer to join or not to join an organization of his choice is a basic American right, and it must be protected." Hearings on S. 109 Before the Subcomm. of the Senate Comm. on Agriculture and Forestry, United States Senate, 90th Cong. 1st Sess. 10 (1967) (hereinafter cited as Senate Hearings). The state-

ments of other members of Congress during floor debates are to the same effect. 114 Cong. Rec. 7449-51 (statements of Reps. Latta, Poage and May 1968).

Congress deliberately protected the producer's right to deal free of any association, as well as the freedom to join one:

> The objective of the bill is to protect the producer in the exercise of a free choice. Many witnesses suggested that the bill did not fully accomplish this purpose, because it protected the producer only from improper pressure not to join an association. To protect his free choice he should also be protected from improper pressure in the other direction, that is, improper pressure to join an association. The committee did not have before it any testimony to indicate that producers were being subjected to any improper pressure to join associations, but was convinced by the logic of the situation that if the objective is to protect the producer and afford him a free choice, the bill should protect him from pressure in either direction.

S. Rep. No. 474, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1871. There is accordingly no room to argue that the Federal Act seeks only to protect the right to join associations.

The legislative history of the Federal Act also clearly shows that Congress intended to protect the *economic* right to refrain from dealing through an association, and not simply the formal *associational* right not to become an official cooperative member. As Senator Jordan stated: "The law intends that . . . he should not be made to join unless he wants to join. He ought to be able to sell anywhere he wants to sell." Senate Hearings,

supra page 13, at 170. The comments of the members of the House of Representatives consistently support this interpretation. As Chairman Poage explained to the House: "We made of the original legislation a two-way proposal which would actually assure to any producer the right to belong or not to belong to a cooperative. . . . We certainly felt it unfair to deny any man the right to sell his crop because he belongs to a group." 114 Cong. Rec. 7451 (1968). Such comments appear throughout the legislative history of the Federal Act.

It is clear from Section 2303(a) of the Federal Act itself, and the abundant legislative history, that Congress intended to protect a farmer's right not to join or deal through an association. If, therefore, a group of farmers in a cooperative association coerced an unwilling farmer into marketing his produce through the association, the cooperative's conduct would be a clear violation of Section 2303(a).

In contrast, the Michigan Act decrees that after an association is accredited, an individual farmer in that association's bargaining unit may no longer negotiate individually with a handler for the sale of his crops. Instead, the farmer is bound by the terms and conditions of the association's contracts, and the association is legislatively appointed as his "exclusive representative." Mich. Comp. Laws § 290.713. The farmer is irrevocably bound by the activities of the association even if he has not voluntarily joined that association. (See Michigan Supreme Court opinion, pages A5 through A8). The only significant difference under the Michigan Act between a "member" and a "nonmember" of an association is that a member has voluntarily appointed the cooperative association as his exclusive agent. Mich. Comp. Laws § 290.702(i).

The Michigan Supreme Court did not deny that the Michigan law destroys the freedom of a non-consenting farmer to deal individually. According to the court, this effect of the Michigan Act does not contravene the Federal Act because the Federal Act was not "meant to affirmatively create or protect rights of private dealing between individual producers and processors." (See opinion, page A8). The sole goal of the Federal Act, the court said, was to protect the right to form cooperatives and to prevent "handler" coercion.

The state court was wrong on two grounds. First, the language of Section 2303(a), and its supporting legislative history, make it patent that Congress was protecting the "right to . . . *refrain from joining* or belonging to an association," 7 U.S.C. § 2303(a) (emphasis added), as well as the right to join associations. Congress could not have used more explicit language in the protection of the right to be free of an association, nor could the members of Congress have been more direct in their statements, quoted above, recognizing that right. In holding that the Federal Act has but a single goal, the Michigan Supreme Court ignored the language and history of Section 2303(a) and the square holdings of two federal district courts. *Garrison* v. *Dairymen, Inc.*, Civ. Action No. 80-1080-3, slip op. (D.S.C. July 28, 1980); *Butz* v. *Lawson Milk Co.*, 386 F. Supp. 227 (N.D. Ohio 1974).

Second, the "handler" coercion prohibited by the Federal Act includes coercion by cooperatives themselves. A reading of the state court opinion demonstrates that the court ignored this important fact. The state court expressly, and improperly, equated the terms "handler" and "processor" (opinion n.7, page A5) and thereby nullified Congress' intent to protect individual farmers against associations themselves. Cooperatives are "handlers" under

the Federal Act (see discussion at pages 12-13 above), and the prohibitions of Section 2303(a) against handler interference with the right not to join associations therefore applies to cooperatives.

Read in light of the statutory inclusion of associations in the definition of handler, the state court's limitation on the scope of the Federal Act is clearly unconstitutional. The state court found that "[i]t [Section 2303(a)] merely protects a producer from being unduly influenced *by a handler* in deciding whether or not to join a cooperative marketing association," (opinion, page A10), and that "[i]ts [the Federal Act's] principal purpose is to insulate individual producer choice from handler coercion." (*Id.*, pages A14-A15). Yet, if the word "cooperative" is substituted for "handler" in the state court's ruling, appellants' point is clearly demonstrated: Congress intended to protect producers against the cooperative's interference with the right not to join an association. Therefore, the Michigan Supreme Court's holding that the relationship between cooperatives and nonmembers is a federally "unregulated area" is untenable.

It is hard to imagine a more complete abridgement of a producer's federal rights than is created by the Michigan Act. In Michigan, nothing remains of a farmer's right to refrain from joining an association. The Michigan Act allows a group of producers to band together and, so long as they represent a majority of farmers and product, dictate their price, conditions and terms of sale to all non-consenting farmers. This is precisely the conduct forbidden by Section 2303(a) of the Federal Act.

In summary, the Michigan Supreme Court clearly erred when it held that the Federal Act did not create or preserve an individual farmer's right to deal free of an association. By the court's own admission, the exis-

tence of such a federal right is fatal to the conflicting provisions of the Michigan Act.

(b) The Federal Act Protects A Handler's Right To Deal Individually With A Farmer, And The Michigan Act Eliminates This Right.

The language and legislative history of the Federal Act also demonstrate Congress' intent to protect a processor's right to deal individually with farmers, which is directly contravened by the Michigan Act.

When the first agricultural marketing bill was introduced in 1964, it encountered a great deal of resistance. H.R. 11146, 88th Cong., 2d Sess. (1964), S. 2849, 88th Cong., 2d Sess. (1964). This bill simply prohibited various specified acts of discrimination against members of farm cooperatives, and provided for criminal penalties for such discrimination.

Senate hearings on the bill began in 1966. Many Senators and witnesses expressed concern during these hearings that the bill could be construed as substituting a collective bargaining system for the existing free m ket system. The American Farm Bureau, the group that had originally sponsored the bill, attempted to dispel these fears. Charles Shuman, the American Farm Bureau representative, testified at the Senate hearings: "We want to emphasize that Farm Bureau does not seek, and will not support, legislation . . . to force processors to negotiate with marketing associations. We seek only legislation which sets forth rules of fair play." Hearings on S. 109 Before the Subcomm. of the Senate Committee on Agriculture & Forestry, 89th Cong., 2d Sess. 15 (1966).

Despite these reassurances from the bill's original sponsors, Congress remained concerned about this issue

See R. Torgerson, Producer Power At The Bargaining Table, A Case Study of the Legislative Life of S. 109 (1970) (hereinafter cited as "Torgerson"). The bill was not reported out of committee in 1966, and was reintroduced in the Senate in 1967. Hearings were again held, and the same concerns were expressed. Various parties expressed their grave concern over whether this was in effect a "Wagner Act", endorsing or allowing unionism in the farm industry. *See* 113 Cong. Rec. 7409 (1967); Torgerson, at pp. 95, 127, *et seq.*

Throughout the various hearings, the Subcommittee members expressed their desire that the free market competitive system remain unimpaired. *See, e.g.,* Senate Hearings, *supra* page 13, at 110. Proponents of the bill assured the Senators that the bill would not impair free competition, or institute compulsory bargaining. For example, Senator Lausch, a co-sponsor of the bill, testified that "this bill does not at all deprive the purchasers or what are called handlers in the bill, of the right to choose from whomever they wished to buy. That is their Constitutional right." *Id.,* at 14.

Despite these assurances, the Committee wished to make it absolutely clear that a handler's right to deal with the individual farmer of his choice was protected, and that the bill did not provide for a compulsory union system of bargaining. The Committee therefore amended the bill by adding a new section 5. The bill as finally passed included section 5, now codified at 7 U.S.C., Section 2304:

> *Disclaimer of Intention to Prohibit Normal Dealing.* Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers,

> nor require a handler to deal with an association of producers.

The Senate Committee Report acknowledged that the proponents of the bill had stated that it was not their intention to require a handler to deal with an association of producers. However, the Committee stated:

> There was some concern . . . that the bill in fact went further than intended. The Committee felt that a clear statement in the bill itself would be helpful to courts, handlers, associations, producers, and others in their construction of this legislation.

S. Rep. No. 474, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1873.

The Senate finally passed the Fair Practices bill with the new disclaimer provision, and the bill was then considered by the House of Representatives. Representative Fred Schwengel testified before the House Committee on Agriculture that the bill as amended "would not end competition by preventing other purchasers from offering a producer a better price or contract than is available through his marketing association. . . . The rights of purchasers are protected . . . purchasers are free to deal with whomever they choose. This includes the right to refuse to deal with a marketing association." Hearings on H.R. 13541 Before the Comm. on Agriculture, House of Representatives, 90th Cong., 1st Sess. 36 (1968). By adding the disclaimer provision now contained in Section 2304, Congress clearly evidenced its intent to protect the rights of purchasers, and to preserve the competitive system.

Two federal courts have considered the import of the language contained in Section 2304. Both courts have held that Section 2304 confers upon a purchaser the right to

continue to deal directly with a farmer even though that farmer may become a member of an association. *Garrison* v. *Dairymen, Inc.*, Civ. Action No. 80-1080-3, slip op. (D.S.C. July 28, 1980); *Butz* v. *Lawson Milk Co.*, 386 F. Supp. 227, 237 (N.D. Ohio 1974).

It is therefore clear from the language of the Federal Act, its legislative history, and the consistent construction of the federal courts interpreting the Act, that one Congressional objective in passing the Act was to protect the right of a handler to continue to deal individually with a farmer, regardless of that farmer's membership or other involuntary inclusion in an association. While Congress also intended to protect the right of the farmer to join, or not to join, an association, Congress conferred that right only insofar as it would not conflict with the handler's right to deal with farmers on an individual basis. Thus Congress struck a careful balance among the interests of farmers, associations, and handlers in the Federal Act.

The Michigan Supreme Court acknowledged that a handler's freedom to deal individually with a farmer is destroyed by the Michigan Act (opinion, pages A5 through A8). Under the Michigan Act, an accredited association becomes the "exclusive representative of all producers in the bargaining unit for the purpose of bargaining with all handlers that purchase the agricultural commodity produced in the bargaining unit". Mich. Comp. Laws § 290.713. The association's exclusive bargaining rights extend to all terms relative to trading between handlers and producers of the given agricultural commodity, including price, quality and quantity. *Id.* A handler's right to deal individually with a farmer is completely eliminated by section 4(1)(h) of the Michigan Act, which makes it an unfair practice for a handler to negotiate with a producer included in the bargaining unit after an association is accredited, even if that

producer has not joined the association. Mich. Comp. Laws § 290.704(1)(h).

In order to avoid a conflict, the Michigan Supreme Court held that section 2304 of the Federal Act does not prevent *the states* from legislatively removing the rights therein conferred. It ruled that Congress intended only to protect the rights of farmers to join cooperatives, and that the remainder of the Federal Act is surplusage that the states can legislatively remove.

This argument flies in the face of the plain language, legislative history and consistent judicial interpretations of the Federal Act. As the legislative history and the decisions of the district courts show, section 2304 of the Federal Act was intended "to protect the handler's right to deal directly with the producer even though the producer in joining the cooperative may have assigned exclusive agency rights to the association. . . ." *Butz* v. *Lawson Milk Co.*, 386 F. Supp. 227, 237 (N.D. Ohio 1974).

Congress clearly intended to protect the rights of handlers in the Federal Fair Practices Act, just as it protected the rights of farmers. The State cannot legislatively remove this federal protection without violating the Supremacy Clause of the United States Constitution.

2. The Conflicts Between The Federal And State Acts Require A Finding That The Michigan Statute Is Preempted.

The preemption doctrine is designed to eliminate precisely the type of statutory conflict presented in this case. The Michigan Act is not saved from preemption merely because it shares a common goal with the Federal Act of protecting the farmers' right to band together in cooperatives, as suggested by the Michigan Supreme Court.

The federal courts have determined that a shared goal will not spare a state law from preemption if it otherwise is inconsistent with the full purposes and objectives of the conflicting federal law. *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977).

In fact, this analysis was recently applied to invalidate several state statutes regulating corporate takeover offers because the state acts conflicted with the Williams Act, 15 U.S.C. § 78m(d), (e), 78n(d), (e), (f). *See National City Lines, Inc.* v. *LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982); *Mite Corp.* v. *Dixon*, 633 F.2d 486 (7th Cir. 1980), *aff'd on other grounds sub nom. Edgar* v. *Mite Corp.*, ... U.S. ....., 102 S. Ct. 2629 (1982);[2] *Dart Industries* v. *Conrad*, 462 F. Supp. 1 (S.D. Ind. 1978); *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979).

Each court acknowledged that the state and federal acts shared the common goal of investor protection, and that Congress and each state took a similar approach to protecting that goal through requiring certain disclosures to shareholders of the targeted corporation. The state acts were held preempted because the approach taken by each state struck a different balance from that provided in the federal statute. Significantly, each state's approach sought to protect only one set of identified interests, in place of the federal act's careful neutrality among the competing interests. By imposing additional requirements, the states upset the careful balance struck by Congress in providing investor protection. As Mr. Justice White noted in *Mite*: "The state thus offers investor protection at the

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2. When the *Mite* case reached this Court, Mr. Justice White found the state act to be preempted, but the other Justices found it unnecessary to reach the question.

expense of investor autonomy—an approach quite in conflict with that adopted by Congress". *Edgar* v. *Mite Corp.*, ... U.S. ....., 102 S. Ct. 2629, 2640 (1982) (White, J.).

The Federal Fair Practices Act presents an even stronger case for preemption than the Williams Act, because it expressly provides protection for the rights of more than one competing group. Moreover, the Williams Act does not include the equivalent of a Section 2304 to protect a tender offeror's rights, or a Section 2303 to protect investor autonomy. Rather, the Williams Act only prescribes the method by which Congress intended to protect one group. Yet, in view of the Act's limited scope and its legislative history, the federal courts have determined that the Williams Act set forth a "balance" of competing interests, which prevails over state laws that alter the balance.

Under the Federal Fair Practices Act, Congress adopted a distinctly different approach to protecting a farmer's right to join a cooperative than the Michigan Act. In the Federal Act, Congress expressed its intent to permit farmers and handlers to make their own decision regarding collective bargaining, free from any discrimination. Moreover, the Federal Fair Practices Act affirmatively recognizes and protects conflicting interests of both farmers who wish to remain independent of an association, and those who wish to join a cooperative association. It is impossible to read the Senate Committee Report without concluding that Congress intended to strike a careful balance among all competing interests. Senate Report 474, *supra* p. 13.

By ignoring these principles, the Michigan Supreme Court committed a basic error. The court determined that even if Congress sought to strike a balance among com-

peting private interests, *the states* were not thereby prohibited from readjusting the relationships between those groups (opinion, page A10). A state's attempt to restructure the balance struck by Congress is the very act that offends the Supremacy Clause and requires preemption of the state regulation. *Cf. Fidelity Federal Savings and Loan Association* v. *De La Cuesta*, ... U.S. ....., 102 S. Ct. 3014 (1982) (state law that rearranged private contract rights of mortgagor and mortgagee is invalid because contrary to federal regulation).

C. A Finding Of Preemption Is Also Required Because It Is Physically Impossible To Fully Comply With Both The Federal And State Statutes.

The Michigan Supreme Court recognized that where it is physically impossible to simultaneously comply with both federal and state laws, the Supremacy Clause strikes down the state law. However, the state court erroneously held that impossibility of compliance does not exist in this case, despite federal court rulings that the Federal Act requires conduct which would be a clear violation of the Michigan Act. *See Garrison* v. *Dairymen, Inc.*, Civ. Action No. 80-1080-3, slip op. (D.S.C. July 28, 1980); *Butz* v. *Lawson Milk Co.*, 386 F. Supp. 227 (N.D. Ohio 1974).

Garrison and *Butz* clearly held that the Federal Act *requires* a handler to negotiate with an individual farmer, regardless of whether he belongs to a cooperative association. In direct contrast, the Michigan Act *forbids* a handler from dealing with individual producers once an accredited association has been formed.

The state court dismissed *Garrison* and *Butz* as standing merely for the proposition that a handler may not coerce a producer. Yet, if a Michigan handler refuses to

bargain with a nonmember producer pursuant to state law, that farmer is thereby coerced into dealing with a cooperative. The handler certainly could not defend a federal lawsuit on the ground that his actions were sanctioned by state law. Therefore, the physical impossibility of simultaneous compliance with both the Federal Act and Michigan Act mandates invalidation of the conflicting state law.

II. THIS APPEAL MERITS PLENARY CONSIDERATION BY THE COURT.

The decision of the Michigan Supreme Court represents a serious narrowing of the provisions and effect of an Act of Congress. Unless reversed by this Court, the decision will be binding precedent in Michigan. A summary affirmance in this case will require all lower federal and state courts to give the Federal Act the same narrow interpretation accorded it by the Michigan Supreme Court. *Hicks* v. *Miranda*, 422 U.S. 332, 343-345 (1975); *see Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977). An affirmance will have national impact, since several states have passed or are considering legislation patterned after the Michigan model. *E.g.*, N.Y. Agric. & Mkts. Law § 294 (McKinney Supp. 1982); H.B. 1144, 53d G.A., 2d Sess. (Colo. 1982); H.B. 2571, 1982 Sess. (Pa.); H.B. 499, 1981 Sess. (Pa.); S.B. 73, 1981 Sess. (Wis.).

It may be that the Michigan Supreme Court was correct in holding that Section 2303 created no right to refrain from joining an association, despite its use of those words; that numerous members of Congress were merely mistaken in thinking that they were protecting rights in Section 2304, which is meaningless surplusage; and that Congress really attempted to balance no competing inter-

ests in the Federal Act. Before subscribing to such a restrictive view of an Act of Congress, this Court should give the question full consideration.

RELIEF REQUESTED

Appellants pray that this Court note its probable jurisdiction over this appeal; that, after plenary consideration, it declare the challenged provisions of Sections 4, 10 and 13 of the Michigan Act to be in conflict with the Federal Act and therefore unconstitutional; and that the contrary judgment of the Michigan Supreme Court be reversed.

Respectfully submitted,

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Dated: March 22, 1983

APPENDIX

1. OPINION OF MICHIGAN SUPREME COURT, FILED DECEMBER 23, 1982, DELIVERED UPON RENDERING FINAL JUDGMENT

STATE OF MICHIGAN
SUPREME COURT

No. 56434

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., a Michigan non-profit corporation; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC., a Michigan corporation; and FERRIS PIERSON, an individual,
Plaintiffs-Appellants,

v

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC., a Michigan corporation,
Defendants-Appellees.

BEFORE THE ENTIRE BENCH (except Riley, J.).

RYAN, J.

This is the second time this litigation has been before the Court.

In 1976, an opinion and supporting orders were issued remanding the case to the circuit court for the development of a record sufficient to permit consideration of the

plaintiffs' original challenge to the constitutionality of the Agricultural Marketing and Bargaining Act, MCL 290.701 *et seq.*; MSA 12.94(101) *et seq.* (hereinafter the AMABA or the Michigan act), and determination of the applicability of the Administrative Procedures Act, MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.*[1] The somewhat unique procedural history detailed in the 1976 opinion brought the case before the Court without the development of a factual record necessary for resolution of some of the substantive challenges then presented. We retained jurisdiction, and the parties, having complied with our prior orders, are before the Court once again.

Plaintiffs include Michigan Canners and Freezers Association, an organization of "handlers"[2] of "agricultural commodities",[3] individual handlers, an incorporated "pro-

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1. See *Michigan Canners & Freezers Ass'n, Inc* v *Agricultural Marketing & Bargaining Board*, 397 Mich 337; 245 NW2d 1 (1976).

2. MCL 290.702(g); MSA 12.94(102)(g).

"(g) 'Handler' means a person other than an association engaged in the business or practice of acquiring agricultural commodities from producers or associations for processing or sale; grading, packaging, handling, storing or processing agricultural commodities received from producers or associations; contracting or negotiating contracts or other arrangements, written or oral, with producers or associations with respect to the production of any agricultural commodity; or acting as an agent or broker for a handler in the performance of any function or act specified above. It does not include a producer who sells at a retail establishment which he owns and operates or who sells directly to consumers at a produce market, agricultural commodities produced by him and agricultural commodities produced by another producer subject to value limitation established by the board."

3. MCL 290.702(f); MSA 12.94(102)(f).

"(f) 'Agricultural commodity' means all perishable fruits and vegetables as defined by the board. The kinds, types and subtypes of products to be classed together as an agricultural commodity for the purposes of this act shall be determined by the board on the basis of common usage and practice."

ducer",[4] and an individual "producer". They have challenged AMABA on three constitutional grounds:

1) The Michigan act conflicts with and is, therefore, pre-empted by the Federal Agricultural Fair Practices Act of 1967, 7 USC 2301 *et seq.* (hereinafter FAFPA or the federal act);

2) The Michigan act is facially unconstitutional because it exceeds the state's police power; and

3) The Michigan act's provisions exceed the scope of its title in violation of the Michigan Constitution.[5]

In addition, plaintiffs contend that the Administrative Procedures Act of 1969, MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.* (hereinafter the APA), is applicable to AMABA and that the defendant Agricultural Marketing and Bargaining Board failed to comply with the requirements of the APA in accepting and accrediting the Michigan Asparagus Growers Division of defendant Michigan Agricultural Cooperative Marketing Association (MACMA) as the bargaining representative of the Processing Asparagus Bargaining Unit. We address the issues in the order raised.

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4. MCL 290.702(e); MSA 12.94(102)(e).

"(e) 'Producer' means any person who produces or causes to be produced in any 1 marketing period within the previous 2 marketing periods, any agricultural commodity in quantity beyond his own family use and having a minimum value at first point of sale as determined by the board for that agricultural commodity, and who is able to, during the marketing period transfer to a handler or an association a merchantable title to the agricultural commodity or provide management, labor, machinery, facilities or any other production input, with the assumption of risk, for the production of the agricultural commodity under a written or oral contract."

5. "No law shall embrace more than one object, which shall be expressed in its title." Const 1963, art 4, § 24.

I

The United States Congress and the Michigan Legislature have each passed legislation to protect a farmer's right to join a cooperative association and to bargain collectively through that association. It is not disputed that FAFPA and AMABA share at least this one common goal. Nevertheless, plaintiffs argue that the scheme chosen by the Michigan Legislature to carry out that purpose conflicts totally with that chosen by Congress and thus pursuant to the supremacy clause contained in art VI of the United States Constitution,[6] the Michigan legislation is "pre-empted".

In interpreting and applying the supremacy clause in the context of competing state and federal legislation, the United States Supreme Court has developed two lines of analysis to describe situations in which federal legislation has pre-empted state lawmaking on the subject in question.

The first is so-called "field pre-emption" in which any state legislation, harmonious or otherwise, is invalid if it seeks to regulate in any area in which Congress has intended to completely occupy the field. See *Rice v Santa Fe Elevator Corp*, 331 US 218; 67 S Ct 1146; 91 L Ed 1447 (1947).

The second type of pre-emption is called "conflict pre-emption" and exists in circumstances in which a state regulation is invalid under the supremacy clause, even though Congress has not fully foreclosed state legislation in a particular area, because the state regulation is held to be in conflict with the federal regulation. The two-

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6. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." US Const, art VI.

prong test to determine if a conflict pre-emption exists was most clearly articulated in *Ray* v *Atlantic Richfield Co*, 435 US 151, 158; 98 S Ct 988; 55 L Ed 2d 179 (1978):

> "A conflict will be found 'where compliance with both federal and state regulations is a physical impossibility' * * * or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "

The parties agree that this is not a case of field pre-emption since the federal act itself, § 2305(d), states that "existing State law" shall not be changed or modified by the federal act. Thus, it is clear that Congress did not intend to foreclose state regulation of agricultural marketing. We note, however, that § 2305(d) is not enough in itself to resolve the dispute in defendants' favor, since the Michigan act was not passed by the Legislature until 1972, four years after the federal act.

Instead, plaintiffs have framed their challenge to the AMABA in conflict pre-emption terms, asserting both that AMABA stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and that "compliance with both federal and state regulations is a physical impossibility". We disagree.

A

Concededly, the FAFPA and the AMABA seek to accomplish the same *general* purpose: to permit producers (farmers) to associate together in a marketing cooperative to enable them to improve their marketing and bargaining position when dealing with food handlers (processors).[7] The primary distinction between the two

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7. For ease of reference, we use the terms handler and processor interchangeably in this opinion although, in a way not germane to our disposition of the issues, there is a technical difference between the two.

regulatory schemes is AMABA's requirement that once an association of producers is accredited by the Agricultural Marketing and Bargaining Board,[8] that association becomes the exclusive sales representative for all producers in the bargaining unit, regardless of membership in the association.[9] Those producers in the bargaining unit who do not join the association are, nevertheless, bound, when dealing separately and individually with a handler, by all terms and conditions of the contract negotiated with handlers and must assist in supporting the association by paying a service fee.[10] Even an association member who chooses to deal with a handler individually, as indeed he may, is likewise bound by the terms of the association's bargain with a handler of the same commodity.

Once an association is accredited, AMABA makes it unlawful for handlers "[t]o refuse to bargain with an accredited association with whom the handler has had prior dealings or with an accredited association whose producers in the bargaining units have had substantial dealing with the handler prior to the accreditation of the association", or "[t]o negotiate with a producer included in the bargaining unit after an association is accredited."[11]

A prerequisite to accreditation is that the association seeking accreditation must have "marketing and bargaining contracts for the current or next marketing period with more than 50% of the producers of an agricultural commodity who are in the bargaining unit and these

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8. The board is created by the act. See MCL 290.703; MSA 12.94(103).

9. MCL 290.710, 290.713; MSA 12.94(110), 12.94(113).

10. MCL 290.710(1); MSA 12.94(110)(1).

11. MCL 290.704(1), subds (g), (h); MSA 12.94(104)(1), subds (g), (h).

contracts cover more than 50% of the quantity of that commodity produced by producers in the bargaining unit".[12] Put differently, before an association becomes the exclusive sales representative of all producers, there must not only be a majority of such producers in favor of, and voting for, such representation, but those producers must also produce a majority of the quantity of the commodity involved.

In contrast to AMABA, FAFPA lacks any such exclusive representation provisions. Instead, FAFPA specifically disavows any attempt to regulate in such a manner:

> "Disclaimer of intention to prohibit normal dealing
>
> "Nothing in this chapter [7 USC 2301 et seq.] shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association of producers." 7 USC 2304.

Plaintiffs claim that this provision should be read either as the affirmative creation of a *processor's* right to deal with the individual farmer of his choice, or the affirmative protection of such a right. It is, in plaintiffs' view, a provision representing a careful balance struck by Congress only after consideration of the conflicting interests of individual producers, processors, and associations. Citing *Jones* v *Rath Packing Co*, 430 US 519; 97 S Ct 1305; 51 L Ed 2d 604 (1977), plaintiffs argue that despite the fact that the Michigan and federal acts share a common general purpose, the method of regulation chosen by Michigan upsets "the balance struck by Congress" and AMABA must, therefore, fall.

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12. MCL 290.707(c); MSA 12.94(107)(c).

Were we to agree that § 2304, or any provision in FAFPA, was meant to affirmatively *create* or *protect* rights of private dealing between individual producers and processors, we would agree that AMABA must fall because, plainly, AMABA conflicts with that result. However, we do not find such meaning in the provisions of the federal act.

The language of § 2304 does not justify the meaning plaintiffs assign to it. The disclaimer provision, rather than having an operative effect, is essentially explanatory, beginning as it does with the phrase "[n]othing in this chapter", referring to the substantive and affirmative provisions of FAFPA. It neither requires nor prevents bargaining between handlers and individual producers or associations of producers. We do not discern from a provision termed a "disclaimer of intention" a positive congressional intent to prohibit the conduct said not to be regulated. There is no logical nexus between a provision declaring "this is what we did not do" and the conclusion that "what we did not do, cannot therefore be done". Section 2304 is nothing more than an explanation of what FAFPA was not intended to do. It did not, in disclaiming any "Intention to prohibit normal dealing", thereby create or affirmatively protect an individual handler's right to bargain with any producer, or an individual producer's right to bargain for himself. It is simply, aside from the disclaimer neutral on *that* point. Section 2304 cannot fairly be read as a statement of congressional intent to prohibit exclusive bargaining by producer associations. It is simply a statement indicating that *FAFPA* did not promulgate an exclusive bargaining system for marketing a producer's agricultural commodity.

This interpretation of § 2304 is bolstered as well by the announced congressional finding and declaration of policy contained in § 2301:

"Agricultural products are produced in the United States by many individual farmers and ranchers scattered throughout the various States of the Nation. Such products in fresh or processed form move in large part in the channels of interstate and foreign commerce, and such products which do not move in these channels directly burden or affect interstate commerce. The efficient production and marketing of agricultural products by farmers and ranchers is of vital concern to their welfare and to the general economy of the Nation. Because agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law. Interference with this right is contrary to the public interest and adversely affects the free and orderly flow of goods in interstate and foreign commerce.

"It is, therefore, declared to be the policy of Congress and the purpose of this chapter to establish standards of fair practices required of handlers in their dealings in agricultural products."

Nothing in this broadly drawn provision suggests a congressional intent to affirmatively *protect* producers from exclusive representation or to affirmatively grant new or protect pre-existing rights to deal freely. Instead, the above-quoted language simply demonstrates a congressional intent to protect producers from handler coercion.

Section 2303, which specifically details the practices prohibited, begins:

"It shall be unlawful *for any handler* knowingly to engage or permit [engagement] * * * in the following practices:

"(a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers, or to refuse to deal with any producer because of the exercise of his right to join and belong to such an association; or

"(b) To discriminate against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition, or other handling of agricultural products because of his membership in or contract with an association of producers". (Emphasis added.)

FAFPA's prohibitions are specifically directed toward regulating *handler* misconduct. Subsection (a) does not afford an absolute right to a producer to deal directly with a handler. It merely protects a producer from being unduly influenced *by a handler* in deciding whether or not to join a cooperative marketing association. While § 2303 makes it unlawful for a handler to coerce a producer to "join and belong to" an assocation, it does not forbid a *state* from requiring exclusive representation of individual producers where a producer majority sees fit.[13]

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13. The parties have argued at length over whether there is any meaningful distinction between being required to *join* an association and merely being required to support and be represented by an association as required by AMABA. Analogies are drawn from the field of labor law and the development of the legal consequences of "agency" versus "union" shop contract clauses.

Though we believe there is such a distinction, see *Abood* v *Detroit Board of Education*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977), its relevance in the pre-emption contest is lacking. The aim of FAFPA is to prevent *handler* coercion. It does not speak to producer protection from all sources of coercion. Even if AMABA were read to require a producer to *join* an association, the coercion would be the product of state action not handler action. Though there undoubtedly would be First Amendment implications, under such circumstances there would still be no conflict between FAFPA and AMABA.

All FAFPA meant to accomplish was to restrain certain types of coercive handler conduct. While § 2303 details the prohibitions, § 2304 makes clear, by way of explanation, the limited scope of those prohibitions. Nowhere in FAFPA is there an attempt to protect or create a positive right to deal with whomever a handler or producer wishes.

Our interpretation of FAFPA in general, and § 2304 in particular, is amply supported by the legislative history of the act. The report of the Secretary of Agriculture to the Senate Committee on Agriculture and Forestry in recommending passage of FAFPA states:

> "Cooperative action in agricultural production and marketing is increasing. It is growing in response to the need, (1) to achieve more orderliness and efficiency in production and marketing, and (2) to protect and improve bargaining relationships between producers and marketing firms in the face of major changes taking place in the marketing system.
>
> "These changes include the growing integration of production and marketing of agricultural products, the increased control of those functions by large, diversified corporations, and the expanded use of contracting by such corporations to meet their needs. Developments such as these weaken the marketing and bargaining position of individual producers.
>
> "It is essential to protect the rights of producers to join together in cooperatives to perform necessary marketing operations, including bargaining with processors and other buyers over the terms of sale of the producers' farm products. Cooperative bargaining has come into prominence as the old market system is being displaced by contractual arrangements in the

production and marketing of agricultural products. We believe these trends will continue.

"The proposed bill would materially strengthen farmers' ability to bargain and market effectively. It will reaffirm the right of producers to join together and operate cooperatives without interference. It will remove some of the impediments confronting producers in organizing and operating their cooperative associations.

"Producers have suffered harassment and reprisal by some processors because of activity in organizing and joining a cooperative. Grower contracts have been canceled or reduced in volume. Processors have offered inducements to growers not to join a cooperative. Attempts have been made to buy off the cooperative's leaders to create dissention in the organization.

"Processors operating in several production areas have coerced growers desiring to form a bargaining cooperative by threatening to leave the cooperative's territory and expand operations elsewhere. Growers have failed to get redress after such questionable processor actions.

"If this bill were enacted, many producers who fear harassment or discrimination would feel free to join a cooperative association. It would help producers use cooperatives as a more effective tool in marketing their products." 1968 US Code Cong & Ad News, p 1875.

Clearly, in the secretary's view, the FAFPA was aimed at enhancing producer bargaining power, not at creating or protecting rights to deal individually.

That intent is reflected as well in the committee report on § 2304:

> "Section 5[§ 2304] disclaims any intent to prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in an association of producers, or to prevent handlers and producers from dealing with one another individually on a direct basis, or to require a handler to deal with an association of producers. The bill does not prevent or require these actions and is not intended to do so. While the proponents of the bill stated in their testimony that this was not the purpose, there was some concern, especially on the part of processors and other purchasers of agricultural products, that the bill in fact went further than intended. The committee felt that a clear statement in the bill itself would be helpful to courts, handlers, associations, producers, and others in their construction of this legislation; and has recommended inclusion of this section in the bill.
>
> "There are many good, sound economic reasons for handlers and producers to select customers and suppliers. The bill does not attempt to prevent these sound reasons from operating.
>
> "While the bill does not prevent handlers and producers from dealing with one another individually on a direct basis, it does prevent handlers from exerting any improper pressure in an effort to weaken associations or discourage membership. While the bill does not require a handler to deal with an association of producers, it certainly makes clear that farmers have a right to form such associations and should be protected in the exercise of this right. The fact is clear that an association of producers which

> has obtained the voluntary membership of a large number of farmers deserves respect and recognition by the handler of agricultural products." HR Rep No 824, S Rep No 474, 90th Cong 2d Sess, reprinted in 1968 US Code Cong & Ad News, pp 1867, 1873.

Section 2304's disclaimer of any congressional intent to affect pre-existing freedom to deal individually cannot be read as a creation of new rights or an express new statutory protection of old rights; nor can it be read as precluding a state from choosing to adjust pre-existing freedom to deal.

Given our interpretation of FAFPA, we cannot see how AMABA "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". As we have indicated, congressional intent was directed at improving the bargaining position of individual producers by protecting them from handler coercion in their choice to join a cooperative marketing association. We discern no intent on the part of Congress, as plaintiffs assert, to affirmatively "strike a balance" among competing interests, including protecting a handler's right to deal directly with a producer or vice versa. In our view, the provisions of AMABA affording exclusive representation to a producers' cooperative created by a majority of the producers of a particular commodity, and the requirement of service fees, was a step by the Michigan Legislature into a previously unregulated area; a step which furthers both the goals of FAFPA and others not prevented by FAFPA by taking an active role in enhancing the bargaining position of producers, protecting not only individuals, but also their associations from internal and external pressures.

FAFPA's producer protections only indirectly affect cooperative associations as associations. Its principal pur-

pose is to insulate individual producer choice from handler coercion. AMABA duplicates these individual protections, but goes further to recognize and insure the *association's* continued right to exist as a separate entity. AMABA's exclusive representation provisions insulate the association from handler attacks on its membership by eliminating the possibility of "sweetheart" offers made to non-association producers, but not to the association's membership. Without doubt, if the purpose of a "sweetheart" offer made to one producer is to coerce another in his choice of association membership, then the handler would be in violation of § 2303(a) of FAFPA. The obvious difficulty in proving such indirect coercion, especially since the justification for a superior offer may rest upon an array of ostensibly sound but often subjective economic factors such as a handler's assessment of quality, is eliminated under an exclusive representation system.

Similarly, AMABA's service fee provisions protect the association's integrity by eliminating the incentive for a producer to be a "free rider", accepting the benefits of association representation without assisting in its cost.[14]

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14. In his opinion, Circuit Judge Thomas Brown specifically found:

> "The problems of the 'free rider' (a non-member who enjoys the co-op price without belonging or paying) and the 'sweetheart contract' (a device engaged in by processors to erode the power of the voluntary co-operative) will both be made obsolete by the provisions of the act."

His finding that these problems existed prior to AMABA's enactment is amply supported in the record by the testimony of witnesses John Handy, producer and organizer of the Great Lakes Cherry Producers Marketing Cooperative, a voluntary marketing association in existence from 1957 to 1967; Dr. James Schaffer, professor of agricultural economics at Michigan State University and a participant in the drafting of AMABA; George Stover, owner and operator of a 700-acre farm; and Noel Stuckman, who was the General Manager of MACMA and an MACMA employee since November, 1971.

Though Congress disavowed the creation of a mini-Wagner Act to accomplish its purpose, nothing in FAFPA can be construed as preventing Michigan from adopting such an approach to accomplish a broader purpose though one inclusive of the federal purpose and one which, in fact, furthers the desire of Congress "to establish standards of fair practices required of handlers in their dealings in agricultural products". 7 USC 2301.

B

Plaintiffs also assert that compliance with both FAFPA and AMABA is physically impossible and thus, under the second prong of conflict pre-emption analysis, the Michigan act must fall. The basis of plaintiffs' claim is its view that *Butz* v *Lawson Milk Co*, 386 F Supp 227 (ND Ohio, 1974) and *Garrison* v *Dairymen*, Civil Action No. 80-1080-3 (D SC, 1980) (Slip Op) interpreted FAFPA to *require* what AMABA forbids, *viz.*: that a handler deal with a producer if the producer so desires. That position is simply incorrect. Such an interpretation of FAFPA would, on its face, conflict with what § 2304 says about the act. Though both courts found handlers in violation, or probably in violation, of FAFPA, it was because the handler's refusal to deal with the producers involved had a coercive effect on the producers' choice of whether to join an association.

In *Butz*, a handler refused to deal with a producer who had assigned to a producer association the exclusive right to sell his milk. In *Garrison*, producers of milk sought an injunction against a handler who refused to accept their milk unless they joined an association of milk producers. In both cases the courts' decisions were directed toward preventing *handler* coercion. Nothing in either case can be fairly read to suggest that the *state*

requirement of exclusive association representation of all unit members makes it physically impossible to comply with both acts.

Association representation, or non-representation, under the Michigan act may not be coerced by a handler just as is it may not under FAFPA. Simply because the State of Michigan has required under AMABA what a handler cannot require under either AMABA or FAFPA does not render compliance with the two acts physically impossible. The producer protection afforded under FAFPA was a protection against handler abuse. Those same protections, and the resulting conduct required of handlers, are afforded by AMABA. Indeed, the protections afforded by § 2303 of FAFPA are virtually identical with those of § 4 of AMABA. Though AMABA regulates more extensively than FAFPA, it substantially duplicates FAFPA's prohibitions on handler conduct. Since the identical prohibitions are placed on handler conduct, and since AMABA's additional provisions pertain only to producers, an area left unregulated by FAFPA, we perceive no physical impossibility of compliance with both acts.

For the foregoing reasons, we find no pre-emption of AMABA by FAFPA.

II

Plaintiffs' second constitutional attack focuses on a claimed violation of their due process rights[15] on the

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15. Article I, § 17, of the Michigan Constitution provides that: "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law". Similarly, the 14th Amendment to the United States Constitution provides that "* * * [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

theory that AMABA is an illegitimate exercise of the state's police power.

The applicable test for determining whether a legislative enactment is a legitimate exercise of the state's police power consistent with due process requirements is twofold: a) does it address a proper public purpose, and b) is the remedy adopted reasonably related to the stated public purpose? *Michigan Canners & Freezers Ass'n, Inc* v *Agricultural Marketing & Bargaining Board*, 397 Mich 337, 343-344; 245 NW2d 1 (1976). A successful constitutional challenge to a legislative enactment on police power grounds requires

> "the party challenging the act [to carry] the burden of overcoming the presumption of constitutionality which accrues to the statute. *Irishman's Lot, Inc* v *Secretary of State*, 338 Mich 662, 667; 62 NW2d 668 (1954); *Thayer* v *Dep't of Agriculture*, 323 Mich 403, 410; 35 NW2d 360 (1949). To overcome this presumption, plaintiff must show either that there is no public purpose to be served by the statute, or that there is no reasonable relationship between the remedy adopted by the Legislature and the public purpose. *Grocers Dairy Co* v *Dep't of Agriculture*, 377 Mich 71, 75; 138 NW2d 767 (1966); *Carolene Products Co* v *Thomson*, 276 Mich 172, 178; 267 NW 608 (1936)."

In *Shavers* v *Attorney General*, 402 Mich 554, 613, 614; 267 NW2d 72 (1978), we announced that what

> "this 'presumption of constitutionality' means, in terms of challenged police power legislation, is that in the face of a due process or equal protection challenge, 'where the legislative judgment is drawn in question', a court's inquiry 'must be restricted to the

> issue whether any state of facts either known or which could reasonably be assumed affords support for it'. *United States* v *Carolene Products Co,* 304 US 144, 154; 58 S Ct 778; 82 L Ed 1234 (1938). A corollary to this rule is that where the legislative judgment *is supported by 'any state of facts either known or which could reasonably be assumed',* although such facts may be 'debatable', the legislative judgment must be accepted. *Carolene Products Co* v *Thomson,* 276 Mich 172, 178; 267 NW 608 (1936)."

We went on in *Shavers,* p 617, relying on our preliminary disposition in this case, to demonstrate that when challenged police power legislation is "important, complicated, novel or experimental legislation", there may be a need to conduct a trial to establish facts necessary to evaluate the challenge. Because of the remand of this case to the circuit court and the proceeding conducted there, such fact development has now occurred. Our task is now the same as it was in *Shavers,* p 618.

> "First, we must determine from the record before us whether plaintiffs have overcome the presumption of constitutionality by showing facts which reveal that the legislative judgment is without rational basis, or, to the same effect, we must determine from the record whether the challenged legislative judgment is supported by *any* reasonable state of facts justifying its enactment. Second, we must then determine whether the legislative response bears a reasonable relation to this identified objective."

Plaintiffs claim that AMABA is designed simply to promote higher prices and upgrade the economic position of producers vis-a-vis handlers, a purpose they characterize as establishing "price security", and one not subsumed

within the purposes of legitimate legislative regulation.[16] Having so defined and limited the purposes of AMABA, plaintiffs argue by analogy to *Shakespeare Co* v *Lippman's Tool Shop Sporting Goods Co*, 334 Mich 109; 54 NW2d 268 (1952), that AMABA must be struck down as an unconstitutional attempt to establish price security, an endeavor directed at disruption of the operation of a free market and thus inconsistent with the public interest.[17] The error in attempting to analogize to *Shakespeare* is inevitable in light of plaintiffs' initial premise that AMABA is aimed at price security and as such is an unnecessary and, because it disrupts the operation of a free healthy market, an unconstitutional intrusion into private enterprise.

Our reading of the act, examination of the circuit judge's opinion and review of the record lead us to con-

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16. In plaintiffs-appellants' brief in this Court, they argue:

"[T]he act is absolutely barren of any ostensible relationship to a valid police power objective. It lacks any indication that it is necessary for the preservation of public health, safety, morals or general welfare, or to prevent fraud. It is not designed as a sanitary measure, or as a method by which impure foods are kept from the tables of the consuming public. Instead, the act attempts to promote price and upgrade the economic position of producers vis-a-vis handlers. This avowed public purpose is constitutionally infirm, since the courts have consistently rejected the concept of price security as a proper basis for the use of the state's police power. *Baldwin* v *Seelig*, 294 US 511; 55 S Ct 497; 79 L Ed 1032 (1935); *Van Winkle* v *Fred Meyer, Inc*, 151 Or 455, 471; 49 P2d 1140, 1146 (1935); *People* v *Kuc*, 272 NY 72; 4 NE2d 939 (1936); *Good Humor Corp* v *City of New York*, 33 NYS2d 905 (S Ct, 1942), *aff'd* 264 AD 620; 36 NYS2d 85 (1942), *aff'd* 290 NY 312; 49 NE2d 153 (1943)."

17. According to plaintiff, *Shakespeare* stands for the proposition that legislation authorizing the vicarious binding of independent businessmen by transactions to which they have not consented exceeds the state's police power. Appellants' brief at 47-48. This is an excessively broad reading of *Shakespeare* and does not withstand scrutiny. The fair trade laws struck down in *Shakespeare* were invalidated because they had nothing to do with a public purpose.

clude that AMABA was not directed toward achieving price security for producers at the expense of the operation of a free market, but was, instead, only intended to overcome an artificial obstacle to the operation of supply and demand forces, *viz.*, the fortuitous position of handlers of perishable agricultural products in the chain of marketing such commodities which permitted handlers to distort free market forces by demanding prices not wholly reflective of supply and demand. AMABA is not a price-fixing act, nor is it intended to allow association control of the output of individual farmers. It is, rather, an enabling act which seeks solely to promote the equalization of bargaining power between producers and processors of perishable products.

The circuit court found as facts that the following conditions existed prior to AMABA's enactment:

a) Growers faced the problem of disposing of extremely perishable fruits and vegetables with a corresponding lack of freezing and/or storage facilities.

b) There existed large numbers of unorganized growers who, when aligned against a concentration of processors, could not individually affect the price paid for their product by processors.

c) The market lacked an extensive number of processors and the growers lacked ability to transport perishable goods any distance.

d) Processors were reluctant to recognize voluntary grower cooperative bargaining associations.

e) Processors were known by growers to discriminate against persons who belonged to cooperative bargaining associations.

f) It was difficult to develop and maintain voluntary bargaining associations because some persons obtained a "free ride" (*i.e.*, accepted the benefits of cooperative bargaining without assisting in its cost).

g) There existed a "take it or leave it" pricing policy with no authority in the fieldmen of the processors to negotiate price.

h) The processor possessed the resources to obtain superior marketing knowledge, while the grower lacked time to obtain or digest information.

i) Any effective producer association would require statewide organization with emphasis on particular products.

j) Growers sometimes engaged in picketing of processors and withholding perishable goods because of unsatisfactory prices.

k) It was difficult to coordinate production and marketing decisions so as to reduce spoilage. Processor failure to announce a price early in the marketing season sometimes led to the withholding of harvested commodities until some spoilage had occurred.

l) Prices received by farmers fluctuated greatly.

m) Supply and demand did play a role in affecting pricing decisions.

All of these findings are amply supported by the record. Taken as a whole, they establish a disparity in bargaining power resulting in disruption of the orderly marketing of perishable agricultural commodities and the imposition of inequitable economic pressure upon independent producers.

Whatever economic advantage plaintiff processors enjoyed prior to AMABA, and lost because of it, was not

so much the result of astute investment of labor or capital as it was the sheer nature of agricultural marketing and the processors' superior position of power in the chain necessary to bring a commodity to the consumer. To the extent bargaining power is equalized, the assumptions of economic theory are validated and the operation of a free market is enhanced. Nothing in AMABA inhibits more producers or processors from entering the market. Nothing in AMABA dictates the price at which agricultural products must be sold or how producers or processors should conduct their business except when it comes time to deal with each other. Thus, the act operates to free the market forces of supply and demand to overcome the artificial price-setting power otherwise vested in processors.[18]

We are confident that legislation designed to enable the producers of agricultural commodities representing more than 27% of the value of this state's annual agricultural yield[19] to better protect themselves from the unfair

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18. Presumably cooperative associations will not find it in their best interests to bargain for excessive prices since processors are free to abandon Michigan producers altogether and fill their needs outside the state. Furthermore, in the event that both parties are unable to agree on a price, yet wish to deal, the dispute will be settled by arbitration. MCL 290.716; MSA 12.94(116).

At least in theory the parties will be engaged in negotiations that will result in a price reflective of the supply available and the demand among consumers for that product. Furthermore, because the relationship between agricultural producers and processors tends to extend over the long run, it will be in the producers' interests to moderate demands when supply is short in exchange for a reasonable price when supply is abundant. Such a moderation should lead to price stability beyond that afforded by exclusive representation and thus to even more efficient planning.

19. This figure is drawn from the testimony and exhibits of Dr. Lawrence Van Mier who was, at the time of his testimony, Director of the Division of Economics and Statistics of the National Canners Association. It is based on volume and value averages for the years 1968 through 1972.

imposition of prices by processors and thereby to improve and insure the production and marketing of perishable fruits and vegetables is within the historically viewed ambit of a legitimate legislative purpose. See *Cady* v *Detroit*, 289 Mich 499; 286 NW 805 (1939).

B

Having concluded that the legislative purpose behind AMABA was to equalize bargaining power between a relatively small number of processors and a large number of producers, thereby eliminating both the potential for economically rational, but unfairly abusive, price-setting by processors and the potential for disrupting the marketing of perishable agricultural products, and having found these purposes to be in the interests of the public welfare, we also find AMABA's provisions reasonably related to those purposes. We find a sufficient and rational relationship between those provisions in AMABA enabling producers to bargain collectively, those protecting producer associations from being weakened through sweetheart deals and free-riders by providing for exclusive representation and service fees, and those providing for compulsory arbitration for resolving impasses with respect to terms subject to bargaining on the one hand, and the Legislature's intent to equalize bargaining power and thereby ensure orderly marketing of perishable, agricultural commodities on the other. We agree with the circuit court that this "act solves some problems [and] creates others" but, on the whole, as demonstrated by competent evidence, it is "reasonably related to the problems perceived by the Legislature and is a reasonable attempt to solve at least some of the problems". We add that the difficulty in assessing whether these goals have yet been achieved does not diminish their legitimacy; "it is precisely because regulation in the economic field

often deals with long-term developments that the Court treats such legislation with great deference." *Shavers* p 629. We find AMABA constitutional on its face.

III

Plaintiffs also argue that the subject matter of AMABA exceeds the scope of its title in violation of Const 1963, art 4, § 24, mandating that "[n]o law shall embrace more than one object, which shall be expressed in its title". The title of AMABA states:

> "An act to permit producers of agriculture commodities to be represented by associations; to create an agricultural marketing and bargaining board; to provide for the accreditation of associations; to establish obligations on the part of handlers and associations; to provide for arbitration; to define unfair practices; and to prescribe penalties."

Plaintiffs assert that since the substance of AMABA *compels* association representation of producers once a majority wants such representation and since the title speaks only to *permitting* such representation, the act exceeds its title in this respect and must be invalidated accordingly.

Plaintiffs' argument is not well taken. "The title need not serve as an index; it is sufficient if it fairly expresses the subject of the legislation and conveys comprehension of its germane provisions". *Krench* v *Michigan*, 277 Mich 168, 175; 269 NW 131 (1936). The title accomplishes that task in this case. AMABA does not, in the first instance, *require* producer representation by association. Instead, it provides for a mechanism permitting producers to organize themselves and then, only when a majority agrees, the system operates to sweep even the

reluctant producer into the association's sphere of authority. The act enables self-motivated producers who want to be represented by an association to undertake to accomplish that task without fear of reprisal by handlers. It is in this sense that AMABA permits producers to be represented by associations. The compulsory aspect of AMABA is secondary but very much germane to its primary permissive-enabling function in that exclusive representation is an additional safeguard to the majority wanting representation by association. In a very real sense requiring representation of the minority permits representation of the majority.

While the Legislature may have more accurately reflected the scope of the act by substituting the phrase "provide for" for "permit" in the title and thereby steer a more neutral course between the elements of permissiveness and compulsion, both part of the act, we do not believe the title, as it stands, promotes deceit or subterfuge or fails adequately to assess the contents of AMABA. In adhering to Justice Cooley's admonition that our constitutional title-object provision "be construed reasonably, and not in so narrow and technical a sense as unnecessarily to embarrass legislation", *Ryerson* v *Utley*, 16 Mich 269, 277 (1868), we do not find that the substantive provisions of AMABA exceed the scope of its title.

IV

Plaintiffs' final contention is that the Administrative Procedures Act of 1969, MCL 24.201 *et seq.*; MSA 3.560 (101) *et seq.*, is applicable to the accreditation proceedings of the AMABA. In our 1976 remand of this case to the trial court, we indicated that the circuit judge could render an opinion as to the APA's applicability to board accreditation procedures, but was foreclosed from issuing

a dispositive order on the question since original jurisdiction over substantive challenges to such board determinations (orders)[20] is vested in the Court of Appeals, pursuant to MCL 290.705(2); MSA 12.94(105)(2). As a practical matter, what we ordered the circuit judge to do was to assist us in issuing a declaratory judgment. He has done so, concluding that accreditation proceedings under AMABA are "contested cases" within the meaning of § 3(3) of the APA, MCL 24.203(3); MSA 3.560(103)(3), and therefore subject to the procedural safeguards of the APA. We agree with that assessment and so hold.

Section 3(3) of the APA provides:

> "'Contested case' means a proceeding • • • in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing."

Association accreditation requirements and procedures are set forth in §§ 7, 8, 9 and 10 of AMABA.[21] Section 7 establishes the minimum standards an association must meet to qualify for accreditation. Sections 8, 9 and 10 discuss the mechanics of the process. Section 8(1) provides:

> "An association desiring accreditation shall file with the board a written request for accreditation in the form as required by the board. The request shall contain properly certified evidence that the association meets the standards for accreditation and shall

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20. In our earlier opinion, we decided that an accreditation determination is an order within the meaning of § 5(2) of AMABA. *Michigan Canners & Freezers Ass'n, Inc v Agricultural Marketing & Bargaining Board*, 397 Mich 337; 245 NW2d 1 (1976).

21. MCL 290.707 through 290.710; MSA 12.94(107) through 12.94(110).

be accompanied by a report of the names and addresses of members, the name of each handler to whom the member delivered or contracted to deliver the agricultural commodity during the previous 2 marketing periods and the quantity delivered. A fee to cover the costs of the board in processing the request shall be established by rule and paid by the association when the request is filed."

Section 9 states:

"(1) Within 60 days following the date of filing with the board a request for accreditation by an association, the board shall determine whether the association shall be accredited. If the board determines that insufficient evidence was filed by the association, the board may permit the association to file an amended request for accreditation within 30 days following the determination and notification of the association.

"(2) Within 30 days following the board's preliminary finding that the association is to be accredited, the board shall hold a public hearing to obtain further evidence relevant to confirmation that the association is to be accredited. Producers of record involved in the bargaining unit shall be notified of the hearing by mail and publication in a newspaper of general circulation in the bargaining unit area at least 10 days prior to the date of the hearing."

Finally, § 10(1), (2) provides:

"(1) The board shall issue and publish its determination within 30 days after the close of the hearing. If the determination of the board is to accredit the association, the board shall include a preliminary declaration of accreditation in its determination. The

preliminary declaration of accreditation shall clearly state that the association shall represent all producers, members and nonmembers alike, who are in the bargaining unit and act as exclusive sales agents for the bargaining unit in negotiations with handlers. A producer covered in a declaration of accreditation may join the association and have full membership rights therein. Handlers shall deduct marketing service fees from the proceeds to be paid to producers for the agricultural commodity in the amount as determined by the association and forward the service fees promptly to the association. The fees shall be within guidelines determined by the board and shall be subject to review by the board upon petition by 15% of the affected producers.

"(2) The accreditation of the association by the board shall be effective 30 days after the publication of the preliminary declaration of accreditation. The board shall delay the accreditation of the association whenever it receives during the 30-day period a petition signed by at least 1/3 of the producers in the bargaining unit who produce at least 1/3 of the production of the agricultural commodity produced by the bargaining unit, exclusive of quantities contracted with processing cooperatives and produced by handlers, and requesting that the association should not be accredited. The board shall determine by a mail referendum of bargaining unit producers within 30 days following receipt of the petition if producers assent to the accreditation of the association. Producers in the bargaining unit shall be deemed to have assented to accreditation if more than 50% of the producers in the bargaining unit who produce more than 50% of the volume of the affected commodity assent to representation by the association."

These provisions establish that when an association files with the board[22] a request for accreditation and supporting documentation of compliance with § 7 requirements, the board has 60 days to evaluate the request and determine whether the supporting evidence sufficiently discloses compliance with § 7 requirements. Within 30 days following the board's finding of sufficient evidence to support the request, "the board shall hold a public hearing to obtain further evidence relevant to confirmation that the association *is to be accredited*". This plain language demonstrates that prior to a hearing, the board cannot make a final accreditation determination. The language of § 10 reinforces this conclusion, as it provides, "The board shall issue and publish its determination within 30 days *after the close of the hearing*". We therefore reject defendants' claim that the accreditation determination is actually made before the hearing and thus is not within the definition of a contested case.

To the contrary, we find, in the AMABA accreditation provisions, all the definitional elements of a contested case. The board is an "agency" since it is created by statute.[23] The proceedings before the board involve the determination of the duties, rights, and privileges of a named party, the association, to wit, the Michigan Asparagus Growers Division of MACMA. The rights, duties, or privileges involved are this association's authority to act and be recognized as the exclusive bargaining agent for all producers in the unit. Finally, the board's accreditation determination could be made only after an opportunity for an evidentiary hearing where presumably any

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22. The "board", as defined in MCL 290.702(d); MSA 12.94(102)(d), is the agricultural, marketing, and bargaining board created in MCL 290.703; MSA 12.94(103).

23. "'Agency' means a * * * board * * * created by * * * statute". MCL 24.203(2); MSA 3.560(103)(2).

producer who did not want to be represented by the association could challenge the evidence supporting the association's request for accreditation or make any other lawful challenge to the association's accreditation.

We cannot find, as defendants have, a legislative intent inherent in AMABA to foreclose application of the APA to AMABA's accreditation proceedings. The failure of AMABA to make specific reference to the APA in the accreditation provisions, while making specific reference to it in three other AMABA provisions,[24] does not, as defendants contend, require application of the maxim *expressio unius est exclusio alterius* and the conclusion that the Legislature did not intend the APA to apply to board accreditation. This is so because the APA defines its own applicability and is not dependent upon express legislative invocation. The applicability of the APA, absent an express exclusion, is governed by a determination whether the statutory agency action falls within the APA's purview. We have concluded, in the present context, that board accreditation proceedings are contested cases within the meaning of the APA. There being no express legislative statement in the AMABA excluding the APA's application, our inquiry is at an end. The APA is applicable.

We note that the parties have stipulated in this case that should this Court find the APA applicable to board accreditation proceedings, all parties will be adequately protected by a "prospective only" ruling. That is, they are in agreement that non-compliance with the APA need not void the accreditation of the Michigan Asparagus Growers Division of MACMA. We therefore do not consider

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24. See MCL 290.703(8); MSA 12.94(103)(8), MCL 290.704(3); MSA 12.94(104)(3), MCL 290.716(1); MSA 12.94(116)(1).

whether, as a policy matter, it would have been prudent or proper for this Court to determine if, in fact, the procedures followed by the board in its accreditation process were in compliance with the APA, apart from pointing out that the Court of Appeals is vested with original jurisdiction over challenges to final board orders.[25]

/s/ James L. Ryan
/s/ John W. Fitzgerald
/s/ Charles L. Levin
/s/ Thomas Giles Kavanagh
/s/ G. Mennen Williams
/s/ Mary S. Coleman

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25. MCL 290.705(2); MSA 12.94(105)(2).

2. OTHER OPINIONS AND ORDERS OF MICHIGAN COURTS, IN CHRONOLOGICAL SEQUENCE

a. ORDER OF DISMISSAL OF CIRCUIT COURT

(Filed April 26, 1974)

Ingham County Circuit
Court No. 74-16369-CZ

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., a Michigan non-profit corporation; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC., a Michigan corporation; and FERRIS PIERSON, an individual,
Plaintiffs

v.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC., a Michigan corporation,
Defendants

At a session of said Court, held in the City Hall, in the City of Lansing, County of Ingham, Michigan, this 26th day of April, 1974;

Present: THE HONORABLE THOMAS L. BROWN, Circuit Judge.

This cause having been brought before the Court on an order to show cause under which plaintiffs sought various relief against the defendants, and the parties having appeared and with their counsel made arguments, the Court having received a motion to dismiss, made by the

defendants, and the Court having received briefs on the motions by the parties and having determined that such motion to dismiss should be granted, because the Court finds it lacks proper subject matter jurisdiction,

NOW, THEREFORE, IT IS ORDERED, that the complaint of the plaintiffs is dismissed for reasons set forth in the opinion of the court, which the Court is preparing for filing.

Thomas L. Brown
Circuit Judge

b. OPINION OF CIRCUIT COURT

(Filed May 3, 1974)

Ingham County Circuit
Court No. 74-16369-CZ

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., a Michigan non-profit corporation; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC., a Michigan corporation; and FERRIS PIERSON, an individual,
Plaintiffs

v.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC., a Michigan corporation,
Defendants

The pleadings indicate that the Defendant Agricultural Marketing and Bargaining Board (Board), pursuant to its authority under The Agricultural Marketing and Bargaining Act (the Act), MCLA 290.701, *et seq.*, MSA 12.94 (101), *et seq.*, declared The Michigan Asparagus Growers as the accredited representative of the Asparagus bargaining unit. Michigan Asparagus Growers is a division of Defendant Michigan Agricultural Cooperative Marketing Association (MACMA). The Plaintiffs objected to designation and commenced the present action.

Following the filing of a verified complaint, the parties were before this Court to show cause why the Defendants should not be enjoined from enforcing the Act. At the oral arguments on the show cause order, Defen-

dants moved that the action be dismissed for lack of jurisdiction. Issues of law have been briefed by all parties.

The question before the Court is whether this Court or the Court of Appeals is the proper court to hear the issues presented by this case. The Act provides for review by the Court of Appeals. Plaintiffs wish to invoke the equitable powers of this Court, alleging procedural errors by the Defendant Board and constitutional defects in the Act.

Defendants contend that this Court does not have jurisdiction to review a decision by the Board. Section 5 of the Act, MCLA 290.705, MSA 12.94 (105) provides for review by the Court of Appeals. However, Plaintiffs reply that review by the Court of Appeals under Section 5 is inapplicable here. It is argued by Plaintiffs that the statutory review procedure is applicable only to orders issued pursuant to Section 4 of the Act.

The result of Plaintiff's logic would result in a bifurcated review procedure. Under the Act the Court of Appeals would hear any action taken under authority of Section 4. All other actions would be taken to Circuit Court as required by the Administrative Procedures Act, MCLA 24.302, 24.303; MSA 3.560(202), 3.560(203).

There is no specific language limiting the review procedure. The statute makes no special definition of an order or other relief. Therefore, this court interprets the statute to require review of all Board action in the Court of Appeals, leaving this Court without jurisdiction as to the matters before it.

Plaintiffs argue that despite the statutory review procedure this Court should exercise its equitable jurisdiction. Constitutional defects in the statute have been alleged by the Plaintiff. It has been held that equitable powers

may be invoked by a court, although administrative remedies have not been exhausted. *Smigel* v *Southgate School District*, 338 Mich 531 (1972); *Diggs* v *State Board of Embalmers*, 321 Mich 508 (1948); *Fitzpatrick* v *Liquor Control Commission*, 316 Mich 83 (1946); *General Motors Corp* v *Attorney General*, 294 Mich 558 (1940); *Lewis* v *State Board of Dentistry*, 277 Mich 334 (1936).

It would be a violation of principles of equity for this Court to exercise jurisdiction in this case. This Court would be involved in causing the proliferation of litigation. A most bizarre situation would be the result. Constitutional issues would be before this Court and all other issues of procedural and legal error before the Court of Appeals. This Court would be faced with the request to enjoin proceedings before the Court of Appeals while constitutional issues are resolved here. Therefore, it would be most inappropriate for this Court to interfere with the jurisdiction of the Court of Appeals.

Defendants' Motion for Dismissal for Lack of Jurisdiction is hereby granted. An order may so enter.

/s/ Thomas L. Brown
Circuit Judge

DATED: May 3rd, 1974.

c. ORDER OF COURT OF APPEALS GRANTING MOTION TO DISMISS CLAIM OF APPEAL (Case No. 20309)

(Filed October 22, 1974)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 22nd day of October in the year of our Lord one thousand nine hundred and seventy-four.

Present the Honorable
Robert J. Danhof
Presiding Judge
John Gillis
Timothy C. Quinn
Judges

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., a Michigan non-profit corporation; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC., a Michigan corporation; and FERRIS PIERSON, an individual,
Plaintiffs-Appellants,

v.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC., a Michigan corporation,
Defendants-Appellees.

In this cause a motion to expedite the appeal and a motion for limited remand are filed by plaintiffs-appellants, and answers thereto and a motion to dismiss the appeal

are filed by defendants-appellees, and due consideration thereof having been had by the Court;

IT IS ORDERED that the motion to dismiss the appeal be, and the same is hereby GRANTED. See *Porter* v *State Board of Examiners in Optometry*, 41 Mich App 150 (1972).

IT IS FURTHER ORDERED that the motion to expedite the appeal, and the motion for limited remand be, and the same are hereby DISMISSED as moot.

d. ORDER OF COURT OF APPEALS DENYING APPLICATION FOR LEAVE TO APPEAL
(Case No. 20310)

(Filed October 22, 1974)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 22nd day of October in the year of our Lord one thousand nine hundred and seventy-four.

Present the Honorable
Robert J. Danhof
Presiding Judge
John Gillis
Timothy C. Quinn
Judges

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., a Michigan non-profit corporation; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC., a Michigan corporation; and FERRIS PIERSON, an individual,
Plaintiffs-Appellants,

v.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC., a Michigan corporation,
Defendants-Appellees.

In this cause an application for leave to appeal, a motion for immediate consideration, a motion to expedite the appeal and a motion for limited remand are filed by plain-

tiffs-appellants, and answers in opposition thereto having been filed, and due consideration thereof having been had by the Court;

IT IS ORDERED that the motion for immediate consideration be, and the same is hereby GRANTED;

IT IS FURTHER ORDERED that the application for leave to appeal from the judgment entered by the circuit court be, and the same is hereby DENIED for lack of merit in the grounds presented, without prejudice to any party filing a petition for review from an order of the Agricultural Marketing and Bargaining Board under the provisions of PA 1972, No. 344;

IT IS FURTHER ORDERED that the motion to expedite the appeal and the motion for limited remand be, and the same are hereby DISMISSED as moot.

e. ORDER OF SUPREME COURT GRANTING LEAVE TO APPEAL

(Filed January 15, 1975)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 15th day of January in the year of our Lord one thousand nine hundred and seventy-five.

Present the Honorable
Thomas G. Kavanagh,
Chief Justice,
Thomas M. Kavanagh,
John B. Swainson,
G. Mennen Williams,
Charles L. Levin,
Mary S. Coleman,
John W. Fitzgerald,
Associate Justices

Supreme Court No. 56434

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., a Michigan non-profit corporation; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC., a Michigan corporation; and FERRIS PIERSON, an individual,
Plaintiffs-Appellants,

v.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC., a Michigan corporation,
Defendants-Appellees.

On order of the Court, the application by plaintiffs-appellants for leave to appeal is considered, and the same hereby is GRANTED.

This Court, without intending to limit the issues to be presented on appeal, invites the parties' detailed attention to the following questions: (1) Whether a unit determination is an "order" under Section 5(2) of 1972 PA 344, and (2) Whether 1972 PA 344 is constitutional in light of plaintiffs-appellants' arguments outlined in pp 10-12 of the complaint filed in Ingham County Circuit Court March 7, 1974.

If plaintiffs-appellants or defendants-appellees desire to make a factual record in connection with the issues in this case, this Court would entertain a petition from either party for remand within 20 days of the certification of this order. Such a remand would involve a prompt hearing before the Ingham County Circuit Court, the prompt preparation of an evidentiary record, and a prompt resolution of disputed questions of fact, not law, by the circuit court. In the event of such a remand, this Court would retain jurisdiction.

f. OPINION OF SUPREME COURT REVERSING DISMISSAL AND REMANDING CASE TO CIRCUIT COURT (FILED AUGUST 25, 1976) REPORTED AT 397 MICH. 337, 245 N.W. 2d 1

MICHIGAN CANNERS & FREEZERS ASSOCIATION, INC v AGRICULTURAL MARKETING & BARGAINING BOARD

Docket No. 56434.

WILLIAMS, J. The instant case poses important questions of first impression regarding the constitutionality and construction of the Agricultural Marketing and Bargaining Act, MCLA 290.701, *et seq.*; MSA 12.94(101), *et seq.* Plaintiff Michigan Canners and Freezers Association also challenges the decision of defendant Agricultural Marketing and Bargaining Board to accept and accredit the Michigan Asparagus Growers Division of defendant Michigan Agricultural Cooperative Marketing Association [MACMA] as the sole bargaining representative of the Processing Asparagus Bargaining Unit.

However, there has been no hearing in the courts below on the merits due to uncertainty on the preliminary procedural question as to which court should properly serve as a forum for the presentation of the issues posed in this case.

We remand to the circuit court for consideration of two issues: first, the constitutionality of the Bargaining Act, and second, the applicability of the Administrative Procedures Act to accreditation proceedings under the act.

I. FACTS

In November, 1973, the Michigan Asparagus Growers Division of appellee Michigan Agricultural Cooperative

Marketing Association, Inc., [MACMA] petitioned defendant Agricultural Marketing and Bargaining Board for a determination of an asparagus bargaining unit under the Michigan Agricultural Marketing and Bargaining Act [henceforth referred to as the Bargaining Act].

The board made such determination, and subsequently accredited Michigan Asparagus Growers as the sole sales and bargaining representative of the newly created Processing Asparagus Bargaining Unit, over the objection of plaintiff Michigan Canners and Freezers Association.

Michigan Canners brought an action in Ingham Circuit Court alternatively as a petition for review of a final decision of an administrative agency under the Administrative Procedures Act, MCLA 24.201 *et seq.*; MSA 3.560(101) *et seq.*, and as an original action seeking an injunction and declaratory ruling on the unconstitutionality and construction of the Agricultural Marketing and Bargaining Act.

The circuit court dismissed this action, ruling that under § 5(2) of the Bargaining Act, all board action requires review in the Court of Appeals.

Moreover, the circuit court explicitly declined to exercise its "equitable jurisdiction" to examine the constitutionality of the act. The court so ruled because it did not want to establish a bifurcated review procedure in which constitutional issues would be before the circuit court while all other issues were before the Court of Appeals.

In May of 1974, plaintiff filed for leave to appeal and a claim of appeal with the Court of Appeals. Both were denied in October, 1974.

Michigan Canners subsequently applied to this Court for leave to appeal the dismissals by the circuit court and the Court of Appeals.

Prior to granting of leave to appeal by this Court, Michigan Canners filed a petition for review in the Court of Appeals under § 5(2) of the Bargaining Act seeking a review of the constitutionality of the act and the procedures followed by the board in accrediting the Michigan Asparagus Growers Division.

MACMA moved to stay Court of Appeals proceedings pending decision by this Court on the application for leave to appeal.

This Court granted leave on January 15, 1975.

II. Remanding Constitutional Challenge to Circuit Court

As mentioned above, plaintiff has raised important questions regarding the constitutionality and construction of the Agricultural Marketing and Bargaining Act without developing a factual record at trial which would help provide a context in which to consider these questions.

To resolve these significant issues in such a factual vacuum would be imprudent where it appears that further factual development would substantially contribute to the proper disposition of the case.

Such is the case here, especially in that Michigan Canners has claimed that the Bargaining Act is unconstitutional because it exceeds the police power of the state. This claim in particular requires full development of facts which might support or undermine the claim that the statute is an invalid exercise of the police power.

The police power, an attribute of state sovereignty, may be properly exercised through regulations which tend to foster the health, order, convenience and comfort of the people and to prevent and punish injuries and offenses

to the public. It has as its object the preservation and/or improvement of social and economic conditions affecting the community at large. Such power is elastic in nature, changing shape as varying social conditions demand correction. *People* v *Sell*, 310 Mich 305, 315-316; 17 NW2d 193 (1945); *People* v *Brazee*, 183 Mich 259, 262; 149 NW 1053 (1914). *People* v *Raub*, 9 Mich App 114, 119; 155 NW2d 878 (1967).

As a matter of law, the party challenging the act carries the burden of overcoming the presumption of constitutionality which accrues to the statute. *Irishman's Lot, Inc.* v *Secretary of State*, 338 Mich 662, 667; 62 NW2d 668 (1954); *Thayer* v *Dept of Agriculture*, 323 Mich 403, 410; 35 NW2d 360 (1949). To overcome this presumption, plaintiff must show either that there is no public purpose to be served by the statute, or that there is no reasonable relationship between the remedy adopted by the Legislature and the public purpose. *Grocers Dairy Co* v *Dept of Agriculture*, 377 Mich 71, 75; 138 NW2d 767 (1966); *Carolene Products Co* v *Thomson*, 276 Mich 172, 178; 267 NW 608 (1936).

As a practical matter, we ask both parties to contribute to the development of a factual context which will allow us to properly resolve the issue of the constitutionality of the act under the principles outlined above. What are the conditions in the farming and food processing industry which led to the enactment of the act? Is there an imbalance in the bargaining power of the growers and the handlers? If so, what are the consequences of that imbalance? Is the number of farmers in Michigan declining? Is the acreage of land devoted to farming on the decrease? Is there reason for concern about food supply in the future? Is there a trend toward larger farms, to the detriment of the small farmer, which

might adversely affect the community at large? How will the operation of the act be beneficial or detrimental to producers, processors and consumers in the short run, and in the long run?

If any of the potential problems suggested above do exist, is there any evidence that the remedies embodied in the Bargaining Act are or are not reasonably related to the purpose of alleviating the problem(s)?

Defendant MACMA questions the appropriateness of the circuit court as a forum for the presentation of these issues given the language of § 5(2) of the Bargaining Act, MCLA 290.705(2); MSA 12.94(105)(2), providing in relevant part:

> "Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may obtain a review of an order in the court of appeals, by filing in the court a written petition requesting that the order of the board be modified or set aside."

However, it is well established that a litigant challenging the constitutionality of a statute and seeking injunctive relief is not necessarily required to follow the appellate procedure provided for in the statute challenged. *Diggs* v *State Board of Embalmers & Funeral Directors*, 321 Mich 508, 513; 32 NW2d 728 (1948); *Asta* v *Department of Revenue*, 338 Mich 505, 511; 61 NW2d 608 (1953); *Smigel* v *Southgate Community School District*, 338 Mich 531, 557; 202 NW2d 305 (1972).

We remand to the circuit court so that evidence relevant to these questions, and other questions related to the constitutionality of the Bargaining Act, may be received by that court.

III. Applicability of APA to Accreditation Proceedings

Plaintiff asserts that the Administrative Procedures Act, MCLA 24.201 *et seq.*; MSA 3.560(101), *et seq.*, is applicable to the Bargaining Act, that the board failed to comply with the requirements of APA.

Defendant MACMA disputes the applicability of APA to the Bargaining Act, and asserts that the circuit court is not the proper forum for consideration of this issue under § 5(2). There has been no hearing on the merits of this issue in the courts below.

While the Court of Appeals no doubt has subject matter jurisdiction over this matter of construction, so also does the circuit court. Section 5(2) provides for original jurisdiction in the Court of Appeals only for review of final orders of the Agricultural and Marketing Board.

However, the issue of the applicability of the APA to the Bargaining Act is not limited to the validity of a particular order, but rather involves a broad question of construction of the statute itself.

Therefore, there is no reason why plaintiff should not be allowed to raise this question before the circuit court on remand along with the constitutional issues.

IV. Validity of the Declaration of Accreditation

The circuit court may not, however, consider plaintiff-appellant's challenge to the validity of the declaration of accreditation of the Michigan Asparagus Growers on the merits for the Legislature has dictated in § 5(2) of the

Bargaining Act, MCLA 290.705(2); MSA 12.94(105)(2),[1] that the Court of Appeals has original jurisdiction over such an appeal.

Plaintiff-appellant asserts that the accreditation is invalid in that it is not based on substantial evidence of compliance with § 7 of the act,[2] as is required by § 5(2).

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1. Section 5(2) of the Bargaining Act reads as follows:

"(2) Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may obtain a review of an order in the court of appeals, by filing in the court a written petition requesting that the order of the board be modified or set aside. A copy of the petition shall be transmitted by the clerk of the court to the board and the aggrieved party shall file in the court the record in the proceeding certified by the board. Upon the filing of the petition, the court shall proceed in the same manner as in the case of an application by the board under this section and shall have the same jurisdiction to grant temporary relief or a restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the board; the findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

2. Section 7 of the Bargaining Act reads as follows:

"Sec. 7. An association shall be accredited upon determination by the board that the association meets all of the following:

(a) The association meets the requirements of the Capper-Volstead act, 7 U.S.C. 291-2.

(b) The association has submitted a copy of its bylaws which provide that: Each member of the association shall have 1 vote in all votes of the membership of the association; that officers or directors shall be elected by a majority of the members voting or by delegates representing a majority of the membership; and that all elections shall be by secret ballot.

(c) The association has marketing and bargaining contracts for the current or next marketing period with more than 50% of the producers of an agricultural commodity who are in the bargaining unit and these contracts cover more than 50% of the quantity of that commodity produced by producers in the bargaining unit. The board may determine the quantity produced by the bargaining unit using information on production in prior marketing periods, current market information, and projections

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It is further argued that such a claim may be heard by the circuit court because the declaration of accreditation is not an "order", as that term is used in § 5(2), which must be reviewed by the Court of Appeals.

We disagree with the claim that the declaration of accreditation is not an order under § 5(2).

In the first instance, we find it difficult to understand plaintiff's saying that § 5(2) applies to accreditation in establishing a requirement of substantial evidence in Court of Appeals review, and yet, does not apply to accreditation in establishing original jurisdiction in the Court of Appeals.

Moreover, an examination of the statute does not support plaintiff's claim that the Legislature intended to establish a bifurcated review procedure for actions of the board in which dispositions regarding unfair practices under the

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Footnote continued—

on production during the current market periods. The board shall exclude from that quantity any quantity of the agricultural commodity contracted by producers with producer owned and controlled processing cooperatives and any quantity produced by handlers. An association whose main purpose is bargaining but which processes a surplus into a form which is not the subject of bargaining is not a processing cooperative. The contracts with members shall specify the agricultural commodity and that the members have appointed the association as their exclusive agent in negotiations with handlers for prices and other terms of trade with respect to the sale and marketing of the agricultural commodity and obligate them to dispose of their production or holdings of the agricultural commodity through or at the direction of the association.

(d) The association has established and authorized a marketing and bargaining committee to negotiate with handlers for the agricultural commodity. The committee shall be comprised of members elected by the members in a secret ballot election. The production of the agricultural commodity shall comprise a significant portion of the total farming operation of each committee member. Members who have any quantity of the commodity contracted with a producer owned and controlled processing cooperative are not eligible to serve on a marketing and bargaining committee for such commodity."

act are "orders" to be reviewed by the Court of Appeals, while dispositions regarding accreditation are "determinations" to be reviewed in the circuit court.[3]

First, it should be noted that what is being challenged here is not merely a determination, but rather a "declaration of accreditation" which is issued after the board has determined that an association should be accredited.[4] While this declaration is not termed an "order" specifically, it functions as a binding order 30 days after publication, absent a challenge to the declaration meeting the requirements of § 10(2) of the act.[5]

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3. Plaintiff supports this claim by arguing that § 4 of the act, which deals with unfair practices, uses the word "order," while § 6 through 10, which deal with accreditation, speak of "determinations."

4. *See* § 10(1) of the Bargaining Act, which reads as follows:

"(1) The board shall issue and publish its determination within 30 days after the close of the hearing. If the determination of the board is to accredit the association, the board shall include a preliminary declaration of accreditation in its determination. The preliminary declaration of accreditation shall clearly state that the association shall represent all producers, members and nonmembers alike, who are in the bargaining unit and act as exclusive sales agents for the bargaining unit in negotiations with handlers. A producer covered in a declaration of accreditation may join the association and have full membership rights therein. Handlers shall deduct marketing service fees from the proceeds to be paid to producers for the agricultural commodity in the amount as determined by the association and forward the service fees promptly to the association. The fees shall be within guidelines determined by the board and shall be subject to review by the board upon petition by 15% of the affected producers."

5. Section 10(2) of the Bargaining Act reads as follows:

"(2) The accreditation of the association by the board shall be effective 30 days after the publication of the preliminary declaration of accreditation. The board shall delay the accreditation of the association whenever it receives during the 30-day period a petition signed by at least 1/3 of the producers in the bargaining unit who produce at least 1/3 of the production of

(Continued on following page)

Furthermore, the use of the word "determination" throughout the act does not suggest, as plaintiff-appellant claims, that the Legislature had carefully chosen this word to inferentially create a bifurcated review system in which the accreditations of bargaining associations are to be reviewed in a forum different from all other actions of the board.

The word "determination" is used with neither great precision nor consistency. In § 9, for example, the words determination and finding are used interchangeably for no apparent reason. In subsection (1), the Legislature used the words "determine" and "determination", while in subsection (2), there is a shift to the word "finding", though it is apparent that no change in meaning was intended.[6]

Footnote continued—

the agricultural commodity produced by the bargaining unit, exclusive of quantities contracted with processing cooperatives and produced by handlers, and requesting that the association should not be accredited. The board shall determine by a mail referendum of bargaining unit producers within 30 days following receipt of the petition if producers assent to the accreditation of the association. Producers in the bargaining unit shall be deemed to have assented to accreditation if more than 50% of the producers in the bargaining unit who produce more than 50% of the volume of the affected commodity assent to representation by the association."

6. Section 9 of the Bargaining Act reads as follows:

"(1) Within 60 days following the date of filing with the board a request for accreditation by an association, the board shall determine whether the association shall be accredited. If the board *determines* that insufficient evidence was filed by the association, the board may permit the association to file an amended request for accreditation within 30 days following the *determination* and notification of the association.

"(2) Within 30 days following the board's preliminary *finding* that the association is to be accredited, the board shall hold a public hearing to obtain further evidence relevant to confirmation that the association is to be accredited. Producers of record involved in the bargaining unit shall be notified of the hearing by mail and publication in a newspaper of general circulation in the bargaining unit area at least 10 days prior to the date of the hearing." (Emphasis added.)

In § 16, which deals with arbitration procedure, the word "determine" is used interchangeably with the word "find" and the word "determination" is used interchangeably with the word "finding", again, for no apparent reason.[7]

Moreover, the wording "finding" seems to be equivalent in this section to an order under § 5(2), for it is said that "This finding [of a reasonable quantity] shall be enforced in accordance with the provisions of section 5". MCLA 290.716(1); MSA 12.94(116)(1).

Such word usage does not suggest that the Legislature intended to establish a strict distinction between orders and determinations under § 5(2).

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7. Section 16 of the Bargaining Act reads in pertinent part as follows:

"Where the quantity of the agricultural commodity to be marketed is in dispute, the handler shall offer to accept for delivery a reasonable quantity of the agricultural commodity. This offer shall be made in writing to the accredited association at least 7 days prior to the start of the marketing period. A copy of this offer shall be sent by registered mail to the board. The accredited association may file a claim for relief with the board if it feels that the offer is unreasonable. The board shall *determine* the issue of reasonableness at a hearing in accordance with Act No. 306 of the Public Acts of 1969, as amended. This *determination* shall have priority over all other board matters. The board shall base its *determination* on: (a) Projections as to the quantity of the agricultural commodity to be produced, (b) the relationship between the quantity of the commodity available and the amount of the quantity accepted by the handler, (c) the kind, grade, and quality of the commodity available, and (d) the past practices of the handler in relation to the items in subdivisions (a), (b) and (c). If, upon the preponderance of the evidence, the board is of the opinion that the quantity is unreasonable, it shall *order* the handler to accept the quantity which the board *finds* to be reasonable. The *finding of the board shall be final*, subject to later modification by the joint settlement committee. *This finding shall be enforced in accordance with the provisions of section 5.* Within 15 days following the start of the marketing period for the agricultural commodity, the board shall establish a joint settlement committee to arbitrate the issues in dispute." (Emphasis added.)

The bifurcated system of review which plaintiff-appellant argues for would create unnecessary inconvenience and expense for parties disputing actions of the board, and we decline to conclude that the Legislature intended such without stronger indications of such intent.

V. Conclusion.

We remand to the circuit court for consideration of the questions of the constitutionality of the Agricultural Marketing and Bargaining Act, and the applicability of the Administrative Procedures Act to accreditation proceedings under the Bargaining Act. We retain appellate jurisdiction over the other issues presented in this case, and will consider those issues, along with the questions hereby remanded to the circuit court, subsequent to the disposition by the circuit court.

Kavanagh, C. J., and Levin, J., concurred with Williams, J.

Lindemer and Ryan, J.J., took no part in the decision of this case.

Coleman, J. (*concurring in part; dissenting in part*). Although it is accepted that the concept of police power is somewhat "elastic in nature", there is a danger here that it be stretched so far as to have no real meaning. Proposed standards such as that which fosters the "convenience and comfort of the people" or preserves and improves "social and economic conditions affecting the community at large" could justify almost any imaginable action.

Remand is proposed because the claim that the statute exceeds the police power "in particular requires full development of the facts". I agree with the remand providing that the trial judge develop those facts deemed

pertinent, but I would leave discussion of the constitutional question until we have the facts.

Unlike Justice WILLIAMS, however, I believe the circuit court may review the declaration of accreditation, although orders concerning unfair practices should be reviewed directly by the Court of Appeals.

The Agricultural Marketing and Bargaining Act, MCLA 290.701 *et seq.*; MSA 12.94(101) *et seq.*, was designed

> "to permit producers of agriculture commodities to be represented by associations; to create an agricultural marketing and bargaining board; to provide for the accreditation of associations; to establish obligations on the part of handlers and associations; to provide for arbitration; to define unfair practices; and to prescribe penalties."

Agricultural commodities are "all perishable fruits and vegetables as defined by the board". MCLA 290.702(f); MSA 12.94(102)(f). Producers of commodities may form

> "a cooperative association of producers or a division thereof, or federation of cooperative associations of producers engaged in the marketing, bargaining, shipping or processing functions of an agricultural commodity on behalf of its members who are producers of such agricultural commodity." MCLA 290.702(a); MSA 12.94(102)(a).

Associations may seek accreditation from the board. See MCLA 290.707-290.710; MSA 12.94(107)-12.94(110). The board has 60 days to make a preliminary determination. If accreditation is recommended, a public hearing must be held within 30 days. After the hearing, the board

has 30 days to issue and publish its determination. The accreditation "shall be effective 30 days after the publication" unless objection is made by at least 1/3 of the producers who together produce at least 1/3 of the commodity.

If an objection is made, the board must hold a "mail referendum" within 30 days to "determine * * * if producers assent to the accreditation of the association." If "more than 50% of the producers * * * who produce more than 50% of the volume of the affected commodity" agree to be represented by the association, then producers "in the bargaining unit shall be deemed to have assented to accreditation". MCLA 290.710(2); MSA 12.94(110)(2). With assent, accreditation is effective immediately; without it, accreditation is denied. MCLA 290.710(3); MSA 12.94(110)(3).

An accredited association "shall represent all producers, members and nonmembers alike". It acts "as exclusive sales agents for the bargaining unit in negotiations with handlers". MCLA 290.710(1); MSA 12.94(110)(1). This is an expansive grant of authority. The Legislature provided a deliberate procedure permitting informed decision-making by the producers. The board does not make the ultimate determination of accreditation. That decision lies in the hands of the producers.

Compare with this the Legislature's concern with unfair practices. All associations, accredited or not, are covered. They are protected from the unfair practices of handlers. MCLA 290.704(1); MSA 12.94(104)(1). They are prohibited from committing unfair practices against handlers. MCLA 290.704(2); MSA 12.94(104)(2).

The board may receive complaints. If it "considers that there is reasonable cause to believe that a person charged has committed a practice in violation of this act",

the board must hold a hearing. MCLA 290.704(3); MSA 12.94(104)(3). If "a preponderance of the evidence" shows a violation, the board "shall issue * * * an order requiring him to cease the violation and shall order further affirmative action as will effectuate the policies of this act". MCLA 290.704(4); MSA 12.94(104)(4).

The Legislature selected the Court of Appeals as the forum to review the board action. The board "may petition the court of appeals for the enforcement of its orders, and for appropriate temporary relief or restraining order". MCLA 290.705(1); MSA 12.94(105)(1). This gives the court "jurisdiction of the proceeding and of the question determined". It "may grant temporary relief or restraining order as it deems just and proper". It may enforce, modify or set aside the board's order. Anyone aggrieved by the board's final order may obtain a similar review. MCLA 290.705(2); MSA 12.94(105)(2).

Unfair practices involve coercion, intimidation, conspiracy and acts disrupting the normal handling of perishable commodities. The board is obliged to hold a hearing, make a record and state its findings of fact which are conclusive "if supported by substantial evidence on the record considered as a whole". The Court of Appeals may order the taking of additional evidence.

Unfair practice complaints demand prompt action to prevent damage to crops and to defuse explosive situations. The Legislature gave the board authority to order that violations cease. The board may order that affirmative actions be taken. Its role in those situations differs greatly from the accreditation process. In the absence of a clear legislative directive, the review procedure provided for unfair practice cases should not be applied to accreditation.

FITZGERALD, J., concurred with COLEMAN, J.

ORDER

Entered November 1, 1976.—REPORTER.

On order of the Court, the motion for clarification of opinion is considered, and the same is granted. As to question 1 presented, it is ordered that the parties be permitted to present evidence on the constitutional questions already raised in this case. As to question 2, the circuit court may render an opinion concerning the applicability of the Administrative Procedures Act, but a dispositive order on the question shall not be issued until this Court issues final process after considering the case after the remand proceedings. As to question 3, the parties have a right to return to this Court upon completion of the remand proceedings.

The motion for leave to amend complaint and/or add additional ground of appeal is considered, and the Court, under GCR 1963, 865.1(1) and 865.1(3), hereby allows plaintiffs-appellants to amend their verified complaint and permits the issue raised by plaintiffs-appellants to be added to the issues on appeal.

LINDEMER and RYAN, JJ., not participating.

g. OPINION OF CIRCUIT COURT UPHOLDING VALIDITY OF STATE ACT (FILED FEBRUARY 2, 1981)

Ingham County Circuit Court
No. 74-16369-CZ

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., a Michigan non-profit corporation; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC., a Michigan corporation; and FERRIS PIERSON, an individual,
Plaintiffs,

v.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC., a Michigan corporation,
Defendants.

This matter was remanded by the Supreme Court to the Circuit Court for consideration of two issues:

1. The constitutionality of the Agricultural and Marketing and Bargaining Act, hereafter referred to as "the Act," MCLA 290.701, *et seq;* MSA 12.94 (101), *et seq,* and

2. The applicability of the Administrative Procedures Act (APA) to accreditation proceedings under the Act.

The Supreme Court asked the parties to "contribute to the development of a factual context which will allow us to properly resolve the issue of constitutionality of the Act."

Eleven days of proceedings were conducted commencing September 6 and ending September 27, 1977. Thirty-one witnesses appeared and gave testimony. The parties

supplied to the court proposed findings of fact with proposed conclusions of law. In addition, the matter has been fully briefed by the parties.

The Supreme Court asked the parties, respecting the constitutional issue, to provide answers to the following questions:

1. What are (were) the conditions in the farming and food processing industry which led to the enactment of the Act?

2. Is there an imbalance in the bargaining power of the growers and the handlers (processors)?

a. If so, what are the consequences of that imbalance?

3. Is the number of farmers in Michigan declining?

4. Is the acreage of land devoted to farming on the decrease?

5. Is there reason for concern about food supply in the future?

6. Is there a trend toward large farms, to the detriment of the small farmer, which might adversely affect the community at large, and

7. How will the operation of the Act be beneficial or detrimental to producers (growers), processors and consumers in the short run, and in the long run?

The Supreme Court further asked the parties to present any evidence that the remedies in the Act are or are not reasonably related to the purpose of alleviating any of the potential problems outlined in 1 through 7 above.

As to 1 the court finds the following conditions existed prior to the enactment of the Act:

a) The growers faced the problem of extremely perishable fruits and vegetables with a corresponding universal lack of freezing and/or storage facilities (Stover, Cohill);

b) The processors were reluctant to recognize voluntary grower cooperative bargaining associations (Torgerson);

c) The processors were known by the growers to discriminate against persons who belonged to cooperative bargaining associations (Handy, Torgerson);

d) There existed a "take it or leave it" pricing policy with no authority in the fieldmen of the processors to negotiate price (Cohill, Dorman, Kennedy, Toan, Shaffer, Torgerson);

e) The market lacked an extensive number of buyers and the growers lacked ability to transport the perishable goods any distance (Shaffer, Stuckman, Garoyan);

f) The growers engaged in picketing of processors and withholding perishable goods because of unsatisfactory prices (Cohill, Stover, Stuckman, Toan);

g) It was difficult to develop and maintain voluntary bargaining associations because some persons obtained a "free ride;" (Anthony, Handy, Shaffer, Stover, Stuckman);

h) It was difficult to coordinate production and marketing decisions so as to reduce spoilage (Shafer);

i) The establishment of the price by the eventual buyer (i.e. A & P, Kroger, etc.), subject to approval by processor management, resulted in a predetermined price without grower input;

j) The inability to predict or control what would happen during the growing and marketing period (i.e.

weather) which would affect the price of products (Anthony);

k) The establishment of price on the basis of "commercial market value" of the raw product, (i.e. that which a grower would receive if sold on the open market) (Cumming);

l) The need for a state-wide organization with emphasis on a particular product, (i.e. apples, cherries) (Collins);

m) The fact that the price received by farmers (growers) fluctuated more than prices for other products (Dahl);

n) The fact that growers and processors were at the mercy of powerful market forces, supply and demand, and, if a short supply developed, the grower had the advantage; if not, the processor had the advantage (Dahl);

o) Large number of unorganized growers who, when aligned against a concentration of processors, could not individually affect price (Garoyan);

p) The processor possessed the resources to obtain superior marketing knowledge, while the grower lacked time to obtain the information (Garoyan);

q) The grower lacked knowledge of the price to be paid for his product until after it had been delivered (Kennedy);

r) Inability of some growers (fruit) to shift easily to other crops if the demand existed or weather an economic factors caused reduced production (Shaffer, Torgerson);

s) The inability to control the supply along with what quantity to produce to influence the market (Shaffer).

It is obvious that myriad problems existed which the act proposed to treat.

A disparity of bargaining power did exist with the following consequences:

a) A concentration of processors and lack of collective power in the growers (Cohill, Garoyan, Kennedy, Stuckman, Torgerson);

b) The growers had a limited role in the determination of the price they would receive for the raw product (Cohill, Garoyan, Kennedy, Stuckman, Torgerson);

c) Although growers had available to them information necessary to diversify crops, to utilize modern technology and to secure sufficient information to effectively market other corps, they lacked the time and technical skills to put the information to effective use (Dahl, Shaffer);

d) If lack of quantity of a given crop existed, the growers possessed superior bargaining power; if not, then the processor had the upper hand (Dahl).

The Court finds that the number of Michigan farmers was decreasing (Wright, Dahl), but the size of remaining farms was constantly increasing with the result that the total acreage devoted to farming remained fairly constant while production increased markedly (Dahl).

In addition, while the total number of workers in farming decreased, mostly family members, production increased and a trend towards larger, more automated farms existed (Brunk).

There was also, as a consequence, a trend towards fewer, more concentrated, processors (Brunk).

The evidence further discloses that the total acreage of land in Michigan devoted to farming was on the de-

crease, but productivity was up and the average size of farms increasing, including the large corporate farms (Dahl).

There appears to be no reason to fear a marked reduction in the food supply, quantity or quality, in the foreseeable future (Dahl, Garoyan, Shaffer) but long range concern for food supply in the less developed countries did exist (Wright).

The evidence, as outlined above, does disclose a trend toward larger farms. The important concern, however, is whether this trend is detrimental to the community at large.

The experts disagree whether this trend is a reason for much concern.

It appears that although total acreage has remained about constant or decreased slightly the production has increased markedly (Dahl). Further, small farms were never a significant factor in the production of the overall farm products (Dahl). Further, as farms become larger they become more efficient, purchase proportionately more goods and pay higher property and income taxes (Dahl). In addition, although larger farms make better use of economies of scale and technology (Dahl, Brunk), large corporate farms command less than 1% of the sales of commercial farms in Michigan (Brunk).

The Court finds that the act will be beneficial to growers in the following ways:

1) no picketing (Shaffer, Toan, Torgerson);

2) less vulnerability, more effective representation and voice (Dahl, Stuckman);

3) binding arbitration to quickly settle disputes (Haughton);

4) price stability and leveling of price variations to create a more orderly bargaining process (Garoyan, Torgerson);

5) the ability to obtain market information in usable form (Shaffer).

The Court finds that the act will cause the following detrimental situations to occur as to growers:

1) the processors will increase out-of-state purchases for a better price (Bowman, Dahl, Anthony, Doran, Leaver);

2) the friendly relationship between grower and processor, which existed in many instances, will deteriorate (Bowman, Dahl, Catey, Hubbard, Goodall, Prillwitz, Van Mier);

3) the grower, in some instances, will lose the ability to cross-bargain, i.e., lower prices for one product in return for a higher price in another (Collins, Prillwitz);

4) the products, being perishable, will deteriorate due to delays in negotiations (Goodall); and

5) the act will accelerate the movement to larger farms and cause a corresponding processor concentration (Dahl, Garoyan).

The court finds the act will be beneficial to processors in the following manner:

1) there will be no picketing of processor plants nor a "dumping" of perishable products (Shaffer, Torgerson);

2) the processor will be able to concentrate efforts towards fewer growers with a corresponding reduction in field men (Dahl);

3) the price for a given product (asparagus, potatoes, tart cherries, apples, kraut cabbage) will be uniform (Torgerson); and

4) there will be a regulated supply and greater ability to negotiate quality (Torgerson).

The court finds that the following factors will be detrimental to the processors:

1) the price will be established by persons other than the processor management or the processors eventual customer (Catey);

2) the act will cause certain processors to relocate plants (Brian, Brunk, Catey, Dahl, Garoyan);

3) the act will prevent the processors from engaging in long range planning (Garoyan, Toan);

4) the act will cause higher incentives because of a "supply response", i.e. the grower will produce a greater supply than the demand if the price is right (Brian).

The consumer should enjoy the following benefits from the act:

1) cooperative activity should improve the quality of the product because quality is a negotiable item (Torgersen), contrary to what plaintiff experts (Dahl and Brunk) insist;

2) the consumer should have a steady, more reliable supply of products (Shaffer, Torgerson); and

3) in addition, the consumer should have a greater selection of products (Torgerson).

On the negative side, the consumer will experience the following ill effects:

1) increased food prices (Dahl);

2) a reduction in plant employment, a loss of plant expansion (Brunk, Dahl) and reduced tax revenues (Dahl).

The court believes certain problems (listed first) will be alleviated by remedies proposed in the act (listed second).

PROBLEM: *Supply and Demand*

The marketing committee in charge of certain products will be aware of price demands so that the price negotiated will not force the processor to purchase out-of-state (Anthony, Stover).

A serious concern exists in this area; that is, the act controls "price" and price, by operation of the market, controls "demand." If demand goes up, up goes supply and price by the Act remains the same. The experts believe the act, or amendments to it, should do something about this "supply response" (Dahl, Garoyan).

PROBELEM: *Negotiable Price*

The act provides for control by various marketing committees of the entire commodity within a given area so the committee possesses bargaining power (Kennedy). In addition, the act allows the parties to reach an agreement for less than the recommended price (Foster).

PROBLEM: *Picketing*

No picketing has occurred since the adoption of PA 344 regarding any commodity which had an accredited association (Stover, Stuckman).

PROBLEM: *Imbalance in Bargaining Power*

The growers have acquired the ability to act collectively (Garoyan, Torgerson, Shaffer, Stuckman), and outlets are available for the raw product (Cohill, Anthony, Stover).

PROBLEM: *Obtaining of market information in usable form*

Through the efforts of the various marketing committees, information will be available and presented in brief, analyzed form (Shaffer, Stover).

PROBLEM: *The individual "unorganized" farmer*

The act makes it far less likely that processors will be able to "gang up" on individual farmers to obtain a favorable price (Garoyan, Torgerson, Shaffer, Stuckman).

PROBLEM: *Uniform Price*

The act makes it far more likely that the same price will be paid to all growers on the same quality product (Shaffer, Stuckman).

PROBLEM: *Waste, deterioration and spoilage (perishability)*

The processes of the act allowing for collective bargaining and arbitration should result in obtaining an early agreement so the problem of perishability is avoided (Haughton). The grower will be aware of the price, will deliver when the product is harvested and the processor will be prepared for the arrival of the product and the price to be paid.

PROBLEM: *Voluntary cooperatives*

The problems of the "free rider" (a non-member who enjoys the co-op price without belonging or paying) and the "sweetheart contract" (a device engaged in by processors to arode the power of the voluntary co-operative) will both be made obsolete by the provisions of the act.

As indicated by the Supreme Court, the plaintiff must show, in order to overcome the presumption of constitutionality, that either:

1) there is no *public purpose* to be served by the statute, or

2) there is no reasonable relationship between the legislative remedy and the public purpose.

In this case, the legislature has enacted this statute to respond to the myriad of problems proven by the credible evidence to exist prior to the legislative response.

The farmer was producing a perishable commodity without adequate knowledge of the expenses to put into its production (i.e. gasoline, fertilizer), in relationship to the price to be received on harvest day. The farmer (grower) came "hat in hand" to the processors and took whatever price he could get. Many times the farmer did not even obtain a price adequate to repay all of his expenses and fixed costs. He was a "price taker", receiving whatever sum he could obtain for a commodity he could not store, freeze or transport elsewhere. The farmer (grower) was, individually, at the mercy of the processor.

The farmer tried to solve this processor power concentration by organizing into "voluntary co-ops." But, this did not work because some individuals made "deals" of their own (sweetheart contracts) or some individuals profited by the activity of the co-op without contributing to its maintenance and welfare (free riders). So the legislature was approached to assist with the act to make membership mandatory and to provide for financial assistance to various bargaining groups.

It should be viewed as fortuitous that a knowledgeable member of the farming business was a member of the legislature, to wit, Bela Kennedy.

An act was passed and given an expiration date (sunset provision). The legislature on a subsequent date removed this expiration date by a wide margin.

The act solves some problems, creates others and does very little, if anything, to deal with a basic concern (i.e.

supply). It would appear that the act will raise prices to the consumer, but at the same time assist the commercial farmer to continue in business, hire help, pay taxes and produce a quality product.

The processors threaten to move out of state or to purchase products out of state at a more reasonable price. This has already happened. The trend appears, however, to be towards increasing the number of states having similar laws, which will prevent, to some extent "shopping around" or relocating by the processors.

The act is, however, as demonstrated by the evidence, reasonably related to the problems perceived by the legislature and is a reasonable attempt to solve at least some of the problems. *Grocers Dairy Co* v *Dept of Agriculture*, 377 Mich 71, 75; 138 NW2d 767 (1966); *Carolene Products Co* v *Thomson*, 276 Mich 176, 178; 267 NW 608 (1936).

The act further proposes to serve a public purpose by allowing the grower (farmer) of certain applicable products (apples, cherries, cabbage, potatoes and asparagus) to have knowledge in advance of the price to be paid for this product. If the price is reasonable and fair a quality product may be bargained for and shipped to the processor. Absent the intangibles such as the weather, the grower should be able to receive a fair profit, thereby insuring that farmers will stay in business, purchase other goods and pay taxes. A public purpose is intended to be served by this statute. It is, therefore, constitutional. *Grocers Dairy Co, supra; Carolene Products Co, supra.*

In conclusion, the court agrees with defendant Board when it argued:

> In summary, the activities sanctioned by this Act benefit not only the growers but also the processors, who will be guaranteed an adequate commodity supply,

and the citizens of the State of Michigan generally. Such activities are well within constitutional limits on the exercise of the police power of the State of Michigan.

The next consideration respecting the inquiry regarding the constitutionality of the act is the question whether it is preempted by the Agricultural Fair Practice Act of 1976 (AFPA).

The plaintiffs assert that the act must be considered unconstitutional, pursuant to the supremacy clause of the U.S. Constitution, in that it is preempted by and is inconsistent with AFPA.

All parties agree, although state it in different ways and in a different order, that preemption of state law by federal legislation can occur in two ways:

1) if a state statute actually conflicts with a federal statute, or stated another way, federal preemption occurs where there is an actual conflict between the federal and state law, and,

2) whenever Congress has acted to provide complete regulation in any given area of commerce, or stated another way, where Congress has occupied the entire field of regulation of a particular subject matter.

See *Florida Lime & Avocado Growers, Inc* v *Paul*, 373 US 132, 83 S Ct 1210, 10 LEd 2d 248 (1963); *Jones* v *Rath Packing Co*, 97 S Ct 1305 (1977).

The court agrees before applying these federal principles to this matter that it would be helpful to determine the nature and purpose of AFPA.

It is clearly evident that Congress believed the bargaining position of farmers deserved improvement; that the farmers should be allowed to join cooperative organiza-

tions to enable them to concentrate power to present a strengthened position to the processors. This was clearly to solve some of the problems presented to the Michigan Legislature, as outlined at trial and as spoken to at the commencement of this opinion.

It is clearly, in the opinion of the court, the objective of AFPA to assist the farmers in their marketing and bargaining position with processors and the AMABA seeks to achieve the same purpose, along with additional help not provided in AFPA.

Equally clear was the congressional intent to preserve the farmers right to opt in or opt out of a cooperative venture in its enactment of AFPA. See Congressional Record, Vol 114, pp 7449, 7450. However, the AMABA does not disturb this right. The act does force growers of products bargained for by recognized bargaining boards to accept the negotiated terms. This suggested loss of freedom is no more significant than that lost by a nonunion member employed in an agency shop.

The majority of a group of growers under AMABA must agree in order to secure the provisions of the act and the minority, for the good of all, are required to go along. The freedom to deal individually is gone, but the advantage of collective action, a united front and a reduced disparity of bargaining power is gained.

The said acts are not therefore in actual conflict so as to render the act (PA 344) preempted by AFPA.

It is obvious that Congress has not sought to occupy the entire field of regulating in this area. The federal act itself provides:

> The provisions of this chapter shall not be construed to change or modify existing state law nor to deprive the proper state court of jurisdiction. 7 US 2305

Additionally, the court is directed to the case of *Pure Milk Co-op* v *National Farmers Organization*, DC Wis (1971), 332 F Supp 866, where the court indicated Congress had not preempted the field of agricultural marketing.

The plaintiffs have directed the court to *Jones* v *Rath Packing, supra*, for the proposition that the federal government has preempted the field of regulation. This case, as the court understands it, stands for the proposition that state law must fall if it "triggers" federal enforcement action.

There is nothing in the proofs which would convince the court of this possibility. In fact, the proofs appear to be to the contrary. Witness Torgerson, a USDA official, indicated that compliance with AMABA would not "trigger" federal enforcement of AFPA.

The reliable proof appears to lie on the side of the defendants which proof would indicate no inconsistency between the two laws.

Therefore, the request that the court find the act unconstitutional on this basis is denied.

The final question for resolution is whether the Administrative Procedures Act, MCLA 24.201, *et seq*; MSA 3.560(101), *et seq*, (APA), is applicable to accreditation proceedings, Sec 9(2) of the Agricultural Marketing and Bargaining Act (AMABA).

Sec 3(3) of the APA, MCLA 24.203(3); MSA 3.650 (103)(3), provides:

> "'Contested case' means a proceedings . . . in which determination of the legal rights, duties or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing."

Sec 9(2) of the AMABA, MCLA 290.709; MSA 12.94 (109), provides:

> Within 30 days following the Board's preliminary finding that the Association is to be accredited the Board shall hold a public hearing to obtain further evidence relevant to confirmation that the Association is to be accredited. Producers of record involved in the bargaining unit shall be notified of the hearing by mail and publication in a newspaper of general circulation in the bargaining unit area at least 10 days prior to the date of the hearing.

It is contended by the plaintiffs, and not seriously contested by the defendants, that the Board is an "agency" under the APA.

It is further asserted by the plaintiffs, and not seriously contested by the defendants, that the proceedings before the Board could involve a determination of the rights and privileges of a named party, to-wit, MACMA.

The only remaining issue is whether the hearing provided is for the purpose of "determining the legal rights, duties or privileges" of MACMA, or, as contended by defendant MACMA, to simply gather further information to confirm the preliminary findings.

The plaintiffs contend that defendant Board agrees the proceeding was a "contested case" within the meaning of the APA. The Court does not find this to be the situation. Defendant Board agrees that the accreditation hearing held by the Board was not held in accordance with the APA, not that it needed to be.

The Court believes that Sec 9(2) calls for input by parties with a possible adversary relationship by way of a public hearing to gather evidence to bear upon a final

determination regarding accreditation. This appears to put this provision of the Act squarely in line with the contested case definition of the APA, and the Court so finds.

The Court agrees that the AMABA need not specifically provide for the express imposition of APA standards in order for APA standards to apply, and the fact the AMABA in certain sections makes provision for the application of the APA does not exclude other sections from being so construed.

An order may enter consistent with the opinion of the court.

/s/ Thomas L. Brown
Thomas L. Brown, Circuit Judge

DATED: January 30th, 1981.

h. ORDER OF CIRCUIT COURT (FILED MARCH 31, 1981)

Ingham County Circuit
Court No. 74-16369-CZ

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., a Michigan non-profit corporation; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC., a Michigan corporation; and FERRIS PIERSON, an individual,
Plaintiffs

v.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC., a Michigan corporation,
Defendants

At a session of said Court, held in the City Hall, City of Lansing, County of Ingham, State of Michigan, on this 31st day of March, 1981.

PRESENT: HONORABLE THOMAS L. BROWN, Circuit Judge

This cause, having been remanded to this Court by the Michigan Supreme Court, *Michigan Canners and Freezers Association, Inc, et al* v *The Agricultural Marketing and Bargaining Board, et al*, 397 Mich 337; 245 NW2d 1 (1976), and having been tried by the Court without a jury, commencing September 6 and ending September 27, 1977, the parties having appeared by their respective attorneys, briefs and findings of fact having been submitted and the

Court having reviewed the entire record in the matter and having rendered a written opinion dated January 30, 1981, which is attached hereto and incorporated by reference herein;

IT IS HEREBY ORDERED, for the reasons stated in the Court's written Opinion, that the Agricultural Marketing and Bargaining Act, 1972 PA 344; as amended, MCLA 290.701 *et seq;* MSA 12.94(101) *et seq*, is found to be constitutional with respect to the challenges made by the Plaintiffs and,

It is the opinion of the Court that the Administrative Procedures Act, 1969 PA 306, as amended, MCLA 24.201 *et seq;* MSA 3.560(101) *et seq*, is applicable to the accreditation proceedings set forth in Section 9(2) of the Agricultural Marketing and Bargaining Act.

/s/ Thomas L. Brown
Thomas L. Brown, Circuit Judge

3. JUDGMENT OF MICHIGAN SUPREME COURT APPEALED FROM (FILED DECEMBER 23, 1982)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 23rd day of December in the year of our Lord one thousand nine hundred and eighty two.

Present the Honorable
John W. Fitzgerald,
Chief Justice
Thomas Giles Kavanagh,
G. Mennen Williams,
Charles L. Levin,
Mary S. Coleman,
James L. Ryan,
Dorothy Comstock Riley,
Associate Justices

SC 56434
CoA 20310
LC 74-26369 CZ

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., a Michigan non-profit corporation; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC., a Michigan corporation; and FERRIS PIERSON, an individual,
Plaintiffs-Appellants,

v

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC., a Michigan corporation,
Defendants-Appellees.

This cause having been brought to this Court by appeal from the Court of Appeals and this Court having remanded the cause to the Circuit Court for the County of Ingham for development of a factual record and the cause having been argued by counsel and due deliberation had thereon by the Court, IT IS HEREBY ORDERED AND ADJUDGED for reasons set forth in the opinion filed herein, (1) that the Agricultural Marketing and Bargaining Act, MCL 290.701 *et seq.* is constitutional and (2) that the accreditation procedures of the Agricultural Marketing and Bargaining Act, MCL 290.701 *et seq.* are subject to the provisions of the Administrative Procedures Act (MCL 24.201 *et seq.*)

Riley, J., not participating.

4. NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES (FILED MARCH 8, 1982)

STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
(Nos. 20309 and 20310)

Ingham County Circuit Court No. 74-16369-CZ
Supreme Court No. 56434

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., a Michigan non-profit corporation; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC., a Michigan corporation; and FERRIS PIERSON, an individual,
Plaintiffs-Appellants,

v.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC., a Michigan corporation,
Defendants-Appellees.

TO: Hon. Harold Hoag, Clerk
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PLEASE TAKE NOTICE that Michigan Canners and Freezers Association, Inc., the individual members of the Michigan Canners and Freezers Association, Inc., Dukesherer Farms, Inc. and Ferris Pierson, Plaintiffs-Appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Michigan Supreme Court entered December 23, 1982.

This appeal is taken pursuant to Title 28 of the United States Code, Section 1257(2).

Dated: March 7, 1983

Warner, Norcross & Judd
By /s/ Ernest M. Sharpe
Ernest M. Sharpe (P-20294)
And
By /s/ Joseph G. Scoville
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PROOF OF SERVICE

STATE OF MICHIGAN)
: ss.
County of KENT)

Nancy Barnard, being duly sworn, states that on the 7th day of March, 1983, she caused to be served a copy of Plaintiffs-Appellants' Notice of Appeal To The Supreme Court of The United States, filed with this Court, in this action, upon the following persons, at their addresses

stated, by first class United States mail, with postage prepaid thereon:

Henry J. Boynton, Esq.
Attorney General's Office
Plaza One Building, Suite One
Lansing, Michigan 48913
James A. White, Esq.
Foster, Swift, Collins & Coey
313 South Washington Square
Lansing, Michigan 48933

/s/ Nancy Barnard
Nancy Barnard

Subscribed and sworn to before me, a Notary Public, this 7th day of March, 1983.

/s/ Lucille C. Grant
Notary Public, Kent County, Michigan

My commission expires: April 17, 1983

5. STATUTES INVOLVED

a. FEDERAL AGRICULTURAL FAIR PRACTICES ACT OF 1967

(Public Law 90-288)
(7 U.S.C. § 2301 *et seq*)

§ 2301. Congressional findings and declaration of policy

Agricultural products are produced in the United States by many individual farmers and ranchers scattered throughout the various States of the Nation. Such products in fresh or processed form move in large part in the channels of interstate and foreign commerce, and such products which do not move in these channels directly burden or affect interstate commerce. The efficient production and marketing of agricultural products by farmers and ranchers is of vital concern to their welfare and to the general economy of the Nation. Because agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law. Interference with this right is contrary to the public interest and adversely affects the free and orderly flow of goods in interstate and foreign commerce.

It is, therefore, declared to be the policy of Congress and the purpose of this chapter to establish standards of fair practices required of handlers in their dealings in agricultural products.

§ 2302. Definitions

When used in this chapter—

(a) The term "handler" means any person engaged in the business or practice of (1) acquiring agricultural

products from producers or associations of producers for processing or sale; or (2) grading, packaging, handling, storing, or processing agricultural products received from producers or associations of producers; or (3) contracting or negotiating contracts or other arrangements, written or oral, with or on behalf of producers or associations of producers with respect to the production or marketing of any agricultural product; or (4) acting as an agent or broker for a handler in the performance of any function or act specified in clause (1), (2), or (3) of this paragraph.

(b) The term "producer" means a person engaged in the production of agricultural products as a farmer, planter, rancher, dairyman, fruit, vegetable, or nut grower.

(c) The term "association of producers" means any association of producers of agricultural products engaged in marketing, bargaining, shipping, or processing as defined in section 1141j(a) of Title 12, or in section 291 of this title.

(d) The term "person" includes individuals, partnerships, corporations, and associations.

(e) The term "agricultural products" shall not include cotton or tobacco or their products.

§ 2303. Prohibited practices

It shall be unlawful for any handler knowingly to engage or permit any employee or agent to engage in the following practices:

(a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers, or to refuse to deal with any producer because of the exercise of his right to join and belong to such an association; or

(b) To discriminate against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition, or other handling of agricultural products because of his membership in or contract with an association of producers; or

(c) To coerce or intimidate any producer to enter into, maintain, breach, cancel, or terminate a membership agreement or marketing contract with an association of producers or a contract with a handler; or

(d) To pay or loan money, give any thing of value, or offer any other inducement or reward to a producer for refusing to or ceasing to belong to an association of producers; or

(e) To make false reports about the finances, management, or activities of associations of producers or handlers; or

(f) To conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by this chapter.

§ 2304. Disclaimer of intention to prohibit normal dealing

Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association of producers.

§ 2305. Enforcement provisions—Civil actions by persons aggrieved; preventive relief; attorneys' fees; security

(a) Whenever any handler has engaged or there are reasonable grounds to believe that any handler is about to engage in any act or practice prohibited by section

2303 of this title, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved. In any action commenced pursuant hereto, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. The court may provide that no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Civil Actions by Attorney General; Federal Jurisdiction; Complaint; Preventive Relief

(b) Whenever the Secretary of Agriculture has reasonable cause to believe that any handler, or group of handlers, has engaged in any act or practice prohibited by section 2303 of this title, he may request the Attorney General to bring civil action in his behalf in the appropriate district court of the United States by filing with it a complaint (1) setting forth facts pertaining to such act or practice, and (2) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the handler, or handlers, responsible for such acts or practices. Upon receipt of such request, the Attorney General is authorized to file such complaint.

Suits by Persons Injured; Federal Jurisdiction; Amount of Recovery; Attorneys' Fees; Limitation of Actions

(c) Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, any provision of section 2303 of this title may

sue therefor in the appropriate district court of the United States without respect to the amount in controversy, and shall recover damages sustained. In any action commenced pursuant to this subsection, the court may allow the prevailing party a reasonable attorney's fee as a part of the costs. Any action to enforce any cause of action under this subsection shall be forever barred unless commenced within two years after the cause of action accrued.

Federal Jurisdiction; Exhaustion of Other Remedies; State Laws and Jurisdiction Unaffected

(d) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

The provisions of this chapter shall not be construed to change or modify existing State law nor to deprive the proper State courts of jurisdiction.

§ 2306. Separability of provisions

If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and of the application of such provision to other persons and circumstances shall not be affected thereby.

b. MICHIGAN AGRICULTURAL MARKETING AND BARGAINING ACT

(Act 344, 1972, p 1010; eff March 30, 1973.)
(Mich. Comp. Laws § 290.701 *et seq*)

AN ACT to permit producers of agriculture commodities to be represented by associations; to create an agricultural marketing and bargaining board; to provide for the accreditation of associations; to establish obligations on the part of handlers and associations; to provide for arbitration; to define unfair practices; and to prescribe penalties.

The People of the State of Michigan enact:

Sec. 1. This act shall be known and may be cited as the "agricultural marketing and bargaining act". (Mich. Comp. Laws §290.701.)

Sec. 2. As used in this act:

(a) "Association" means a cooperative association of producers or a division thereof, or federation of cooperative associations of producers engaged in the marketing, bargaining, shipping or processing functions of an agricultural commodity on behalf of its members who are producers of such agricultural commodity.

(b) "Accredited association" means an association accredited in accordance with this act.

(c) "Person" means an individual, partnership, corporation or association.

(d) "Board" means the agricultural marketing and bargaining board created in section 3.

(e) "Producer" means any person who produces or causes to be produced in any 1 marketing period within

the previous 2 marketing periods, any agricultural commodity in quantity beyond his own family use and having a minimum value at first point of sale as determined by the board for that agricultural commodity, and who is able to, during the marketing period transfer to a handler or an association a merchantable title to the agricultural commodity or provide management, labor, machinery, facilities or any other production input, with the assumption of risk, for the production of the agricultural commodity under a written or oral contract.

(f) "Agricultural commodity" means all perishable fruits and vegetables as defined by the board. The kinds, types and subtypes of products to be classed together as an agricultural commodity for the purposes of this act shall be determined by the board on the basis of common usage and practice.

(g) "Handler" means a person other than an association engaged in the business or practice of acquiring agricultural commodities from producers or associations for processing or sale; grading, packaging, handling, storing or processing agricultural commodities received from producers or associations; contracting or negotiating contracts or other arrangements, written or oral, with producers or associations with respect to the production of any agricultural commodity; or acting as an agent or broker for a handler in the performance of any function or act specified above. It does not include a producer who sells at a retail establishment which he owns and operates or who sells directly to consumers at a produce market, agricultural commodities produced by him and agricultural commodities produced by another producer subject to value limitation established by the board.

(h) "Marketing period" for an agricultural commodity shall be a period of time determined by the board

during which producers normally deliver for sale to handlers or contract with handlers for the production and future delivery for sale of substantially all of a crop or periodic production of the agricultural commodity.

(i) "Member" means a producer who has entered into a contract with an association appointing the association as his exclusive agent in negotiations with handlers with respect to the marketing of an agricultural commodity. (Mich. Comp. Laws §290.702.)

Sec. 2a. Any sale of a commodity by a producer to another producer for his own exclusive use and not for resale or any sale of fresh market produce directly to a consumer or to a retail store or stand for resale to consumers shall be excluded from the provisions of this act. (Mich. Comp. Laws §290.702a.)

Sec. 3. (1) An agricultural marketing and bargaining board is created within the department of agriculture. The board shall administer this act.

Membership; appointment; qualifications; terms of office.] (2) The board consists of 5 individuals who shall be citizens of the state appointed by the governor with the advice and consent of the senate, not more than 3 of whom shall be affiliated with the same political party. A minimum of 2 members of the board shall derive a substantial portion of their livelihood from agricultural enterprises. One member shall be considered a lay person, neither a producer, nor handler, nor a member of an association, as defined under this act. The governor shall designate 1 member of the board to serve as chairman of the board. The original board shall be composed of 2 members of the board for a 1-year term, 1 member of the board for a 2-year term, 1 member of the board for a 3-year term and 1 member of the board for a 4-year

term. The governor shall indicate the length of term when making the appointment of the original board. Thereafter, as the term of each member of the board expires, the governor, with the advice and consent of the senate, shall appoint a successor to serve for a term of 4 years. An individual appointed to fill a vacancy caused by other than expiration of the term shall be appointed only for the unexpired term of the member of the board whom he shall succeed.

Removal; procedure; cause.] (3) A member of the board may be removed by the governor, upon notice and hearing, for neglect of duty, or for corrupt conduct in office, or for any other misfeasance or malfeasance but for no other cause.

Vacancy, effect; quorum.] (4) A vacancy in the board shall not impair the right of the remaining members to exercise all of the powers of the board. Three members of the board constitutes a quorum.

Per diem.] (5) Members of the board are entitled to receive a per diem fixed by the legislature and all necessary traveling and subsistence expenses incurred while attending meetings of the board or engaged in the performance of official responsibilities delegated by the board or such other amounts as may be appropriated by the legislature.

Provision of implementation services.] (6) Services for implementing this act shall be provided by the department of agriculture from appropriations made therefor by the legislature.

Rules.] (7) The board may promulgate rules necessary for the administration of this act in accordance with and subject to Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Compiled Laws of 1948. (Mich. Comp. Laws §290.703.)

Sec. 4. (1) Producers of agricultural commodities are free to join together voluntarily in associations as authorized by law without interference by handlers. A handler shall not engage nor permit an employee or agent to engage in any of the following practices, defined as unfair practices:

(a) To coerce a producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association or to refuse to deal with a producer because of the exercise of his right to join and belong to an association except as provided in section 15.

(b) To discriminate against a producer with respect to price, quantity, quality or other terms of purchase, acquisition or other handling of agricultural products because of his membership in or contract with an association.

(c) To coerce or intimidate a producer to breach, cancel or terminate a membership agreement or marketing contract with an association or a contract with a handler.

(d) To pay or loan money, give anything of value or offer any other inducement or reward to a producer for refusing or ceasing to belong to an association.

(e) To make or circulate unsubstantiated reports about the finances, management or activities of associations or handlers.

(f) To conspire, combine, agree or arrange with any other person to do or aid or abet the doing of any practice which is in violation of this act.

(g) To refuse to bargain with an accredited association with whom the handler has had prior dealings or with an accredited association whose producers in the bargaining units have had substantial dealing with the handler prior to the accreditation of the association.

(h) To negotiate with a producer included in the bargaining unit after an association is accredited.

Unfair practices.] (2) An association shall not engage nor permit an employee or agent to engage in the following practices, defined as unfair practices:

(a) To enter into a contract which discriminates against a producer represented by an accredited association whether or not he is a member producer.

(b) To act in a manner contrary to the by-laws of the association.

(c) To refuse to bargain with a handler with whom the accredited association has had prior dealing or with whom its producers have had substantial dealing prior to the accreditation of the association.

(d) To coerce or intimidate a handler to breach, cancel or terminate a membership agreement or marketing contract with an association or a contract with a producer.

(e) To make or circulate unsubstantiated reports about the finances, management or activities of other associations or handlers.

(f) To conspire, combine, agree or arrange with any other person to do or aid or abet the doing of any practice which is in violation of this act.

Violations or threatened violations; complaints; investigations; procedure.] (3) For the purpose of enforcing this act, the board may receive sworn complaints with respect to violations or threatened violations. The board may make all necessary investigations, examinations or inspections of any violation or threatened violation specified in the sworn complaint filed with the board. If upon such investigation, the board considers that there is reasonable cause to believe that a person charged has

committed a practice in violation of this act, the board shall issue and cause to be served a complaint upon the person in accordance with Act No. 306 of the Public Acts of 1969, as amended. The complaint shall summon the person to a hearing before the board or a member thereof or a hearing officer at the time and place fixed.

Determination as to violation; fact findings; cease and desist orders.] (4) If, upon a preponderance of the evidence, the board determines that the person complained of has committed a practice in violation of this act, it shall state its findings of fact and shall issue and cause to be served on the person an order requiring him to cease the violation and shall order further affirmative action as will effectuate the policies of this act.

Determination as to nonviolation; fact findings; dismissal.] (5) If, upon a preponderance of the evidence, the board is of the opinion that the person complained of has not committed a practice in violation of this act, it shall make its findings of fact and issue an order dismissing the complaint.

Modification or setting aside of findings or orders.] (6) Until the record in a case has been filed in a court, as provided in this act, the board at any time upon reasonable notice and in such manner as it deems proper, may modify or set aside, in whole or in part, any finding or order made or issued by it. (Mich. Comp. Laws §290.704.)

Sec. 5. (1) The board may petition the court of appeals for the enforcement of its orders, and for appropriate temporary relief or restraining order and shall file in the court the record in the proceedings. Upon the filing of the petition, the court shall cause notice to be served upon the person and thereupon shall have juris-

diction of the proceeding and of the question determined, and may grant temporary relief or restraining order as it deems just and proper and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the board. An objection that has not been urged before the board, a member thereof or a hearing officer before whom a hearing was conducted shall not be considered by the court, unless the failure or neglect to urge the objection shall be excused because of extraordinary circumstances. The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole is conclusive. If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the board, the court may order additional evidence to be taken before the board, a member thereof, or hearing officer and to be made a part of the record. The board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed and it shall file the modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that it shall be subject to review in accordance with established procedures for appeal.

Review by court of appeals; procedure.] (2) Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may

obtain a review of an order in the court of appeals, by filing in the court a written petition requesting that the order of the board be modified or set aside. A copy of the petition shall be transmitted by the clerk of the court to the board and the aggrieved party shall file in the court the record in the proceeding certified by the board. Upon the filing of the petition, the court shall proceed in the same manner as in the case of an application by the board under this section and shall have the same jurisdiction to grant temporary relief or a restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the board; the findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Commencement of proceedings; effect.] (3) The commencement of proceedings under this section shall not stay enforcement of the board's decision but the board or the reviewing court may order a stay upon such terms as it deems proper. (Mich. Comp. Laws §290.705.)

Sec. 6. (1) The board shall determine whether a proposed bargaining unit is appropriate. This determination shall be made upon the petition of an association representing not less than 10% of the producers of the commodity eligible for membership in the proposed bargaining unit as defined by the association. An association with an overlapping definition of bargaining unit may, upon the presentation of a petition by not less than 10% of the producers eligible for membership in the overlapping bargaining unit, contest the proposed bargaining unit. The board shall hold a hearing in accordance with Act No. 306 of the Public Acts of 1969, as amended, to resolve the dispute.

Factors in making determination.] (2) In making its determination, the board shall define as appropriate the largest bargaining unit in terms of the quantity of the agricultural commodity produced, the definition of the agricultural commodity, geographic area covered and number of producers included as is consistent with the following criteria:

(a) The community of interest of the producers included;

(b) The potential serious conflicts of interests among members of the proposed unit;

(c) The effect of exclusions on the capacity of the association to effectively bargain for the bargaining unit as defined;

(d) The kinds, types and subtypes of products to be classed together as agricultural commodity for which the bargaining unit is proposed;

(e) Whether the producers eligible for membership in the proposed bargaining unit meet the definition of "producer" for the agricultural commodity involved;

(f) The wishes of the producers;

(g) The pattern of past marketing of the commodity. (Mich. Comp. Laws §290.706.)

Sec. 7. An association shall be accredited upon determination by the board that the association meets all of the following:

(a) The association meets the requirements of the Capper-Volstead act, 7 USC 291-2.

(b) The association has submitted a copy of its bylaws which provide that: Each member of the association shall have 1 vote in all votes of the membership

of the association; that officers or directors shall be elected by a majority of the members voting or by delegates representing a majority of the membership; and that all elections shall be by secret ballot.

(c) The association has marketing and bargaining contracts for the current or next marketing period with more than 50% of the producers of an agricultural commodity who are in the bargaining unit and these contracts cover more than 50% of the quantity of that commodity produced by producers in the bargaining unit. The board may determine the quantity produced by the bargaining unit using information on production in prior marketing periods, current market information, and projections on production during the current market periods. The board shall exclude from that quantity any quantity of the agricultural commodity contracted by producers with producer owned and controlled processing cooperatives and any quantity produced by handlers. An association whose main purpose is bargaining but which processes a surplus into a form which is not the subject of bargaining is not a processing cooperative. The contracts with members shall specify the agricultural commodity and that the members have appointed the association as their exclusive agent in negotiations with handlers for prices and other terms of trade with respect to the sale and marketing of the agricultural commodity and obligate them to dispose of their production or holdings of the agricultural commodity through or at the direction of the association.

(d) The association has established and authorized a marketing and bargaining committee to negotiate with handlers for the agricultural commodity. The committee shall be comprised of members elected by the members in a secret ballot election. The production of the agricultural

commodity shall comprise a significant portion of the total farming operation of each committee member. Members who have any quantity of the commodity contracted with a producer owned and controlled processing cooperative are not eligible to serve on a marketing and bargaining committee for such commodity. (Mich. Comp. Laws §290.707.)

Sec. 8. (1) An association desiring accreditation shall file with the board a written request for accreditation in the form as required by the board. The request shall contain properly certified evidence that the association meets the standards for accreditation and shall be accompanied by a report of the names and addresses of members, the name of each handler to whom the member delivered or contracted to deliver the agricultural commodity during the previous 2 marketing periods and the quantity delivered. A fee to cover the costs of the board in processing the request shall be established by rule and paid by the association when the request is filed.

Report; form; contents; confidentiality of information.] (2) The board may require all handlers of an agricultural commodity produced in the bargaining unit area as individuals or through their trade association to file with the board within 30 days following a request, a report, properly certified, showing the correct names and addresses of all producers of the agricultural commodity who have delivered the agricultural commodity to the handler during the 2 marketing periods preceding the filing of the report and the quantities of the agricultural commodity received by the handler from each named producer during the periods. The information contained in the individual reports of handlers filed with the board shall not be made public by the board nor available to any person for private use. (Mich. Comp. Laws §290.708.)

Sec. 9. (1) Within 60 days following the date of filing with the board a request for accreditation by an association, the board shall determine whether the association shall be accredited. If the board determines that insufficient evidence was filed by the association, the board may permit the association to file an amended request for accreditation within 30 days following the determination and notification of the association.

Hearing; notice.] (2) Within 30 days following the board's preliminary finding that the association is to be accredited, the board shall hold a public hearing to obtain further evidence relevant to confirmation that the association is to be accredited. Producers of record involved in the bargaining unit shall be notified of the hearing by mail and publication in a newspaper of general circulation in the bargaining unit area at least 10 days prior to the date of the hearing. (Mich. Comp. Laws §290.709.)

Sec. 10. (1) The board shall issue and publish its determination within 30 days after the close of the hearing. If the determination of the board is to accredit the association, the board shall include a preliminary declaration of accreditation in its determination. The preliminary declaration of accreditation shall clearly state that the association shall represent all producers, members and nonmembers alike, who are in the bargaining unit and act as exclusive sales agents for the bargaining unit in negotiations with handlers. A producer covered in a declaration of accreditation may join the association and have full membership rights therein. Handlers shall deduct marketing service fees from the proceeds to be paid to producers for the agricultural commodity in the amount as determined by the association and forward the service fees promptly to the association. The fees shall be within

guidelines determined by the board and shall be subject to review by the board upon petition by 15% of the affected producers.

Accreditation; effectiveness; delay, petition; referendum; producers deemed to have assented.] (2) The accreditation of the association by the board shall be effective 30 days after the publication of the preliminary declaration of accreditation. The board shall delay the accreditation of the association whenever it receives during the 30-day period a petition signed by at least 1/3 of the producers in the bargaining unit who produce at least 1/3 of the production of the agricultural commodity produced by the bargaining unit, exclusive of quantities contracted with processing cooperatives and produced by handlers, and requesting that the association should not be accredited. The board shall determine by a mail referendum of bargaining unit producers within 30 days following receipt of the petition if producers assent to the accreditation of the association. Producers in the bargaining unit shall be deemed to have assented to accreditation if more than 50% of the producers in the bargaining unit who produce more than 50% of the volume of the affected commodity assent to representation by the association.

Notice of outcome of referendum; immediately effective accreditation; denial of accreditation.] (3) All affected producers, handlers and other interested parties shall be notified of the outcome of the referendum within 10 days following the referendum. Accreditation shall be effective immediately if producers assent. Accreditation shall be denied without the required assent of the producers.

Subsequent accreditation request; time.] (4) An association which is denied accreditation may not file another

request for accreditation for a period of 1 year. (Mich. Comp. Laws §290.710.)

Sec. 11. An accredited association shall file an annual report with the board in such form as required by the board to determine if the association continues to meet the requirements of accreditation as provided in section 7. (Mich. Comp. Laws §290.711.)

Sec. 12. To revoke the accreditation of an accredited association the board shall employ a procedure similar to the accreditation procedure set forth in sections 8, 9 and 10. Revocation of accreditation shall be considered by the board upon any of the following conditions:

(a) Upon receipt of a request from an accredited association for its own disaccreditation.

(b) Upon receipt of a petition requesting that the accredited association be disaccredited and bearing the signatures of at least 1/3 of the producers in the bargaining unit who produce at least 1/3 of the bargaining unit production of the agricultural commodity exclusive of quantities contracted with processing cooperatives and produced by handlers.

(c) A request for revocation of accreditation may not be accepted by the board during the marketing period or for a 60-day period prior thereto. (Mich. Comp. Laws §290.712.)

Sec. 13. (1) As used in this act, "bargaining" means the mutual obligation of a handler and an accredited association or their designated representatives to meet at reasonable times and confer and negotiate in good faith. The obligation does not require either party to agree to a proposal or to make a concession. An accredited association is the exclusive representative of all producers in the bar-

gaining unit for the purpose of bargaining with all handlers that purchase the agricultural commodity produced in the bargaining unit. Negotiations may include all terms relative to trading between handlers and producers of the agricultural commodity such as:

(a) Prices and related terms of sale.

(b) Quality specifications.

(c) Quantity to be marketed.

(d) Transactions involving products and services utilized by 1 party and provided to the other party.

(2) The parties shall notify the board of the commencement of negotiations. (Mich. Comp. Laws §290.713.)

Sec. 14. (1) Upon the request of an accredited association or upon the request of a handler, the board shall provide for the mediation of the issues in dispute. The board shall take such steps as it deems expedient to effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between the association and the handler which could disrupt the normal sale and purchase of the agricultural commodity between producers and the handler. The board shall:

(a) Arrange for, hold, adjourn or reconvene a conference or conferences between disputants and 1 or more of their representatives.

(b) Invite the disputants and their representatives to attend the conference and submit, orally or in writing, the differences between the disputants.

(c) Discuss the differences with the disputants or their representatives.

(d) Assist in negotiating and drafting agreements for the adjustment and settlement of differences.

Designee to act on behalf of board; powers; qualifications.] (2) In implementing its duties under this section, the board may designate 1 of its members or retain a competent individual to act in its behalf and may delegate to the designee its duties, and for such purpose, the designee shall have all of the powers conferred upon the board in connection with the discharge of the duties so delegated. If the board seeks to retain an individual to mediate a dispute, it shall attempt to retain an individual who has experience in mediation and in agricultural marketing.

Fee.] (3) Where an individual is retained, the board shall establish his fee in advance. (Mich. Comp. Laws §290.714.)

Sec. 15. At any time prior to 30 days before the first day of the marketing period, if an agreement on the issues in dispute between the accredited association and the handler has not been reached, the handler may elect not to purchase, directly or indirectly, any quantity of the agricultural commodity produced in the bargaining unit during the marketing period or the affected producers may elect, as represented by the association, not to sell, directly or indirectly, any quantity of the agricultural commodity to the handler during the marketing period. If either party makes an election, the other party is not under an obligation to continue bargaining with the party so electing during that marketing period. (Mich. Comp. Laws §290.715.)

Sec. 16. (1) If the election provided for in section 15 is not exercised by the association or the handler involved in negotiations, and if the issues in dispute are not agreed upon through good faith bargaining by the first day of the marketing period for the agricultural commodity, the parties shall be deemed to have consented to the settlement of all issues in dispute by arbitration and the

association shall agree that producers shall deliver the agricultural commodity to the handler or initiate the production of the agricultural commodity for future delivery to the handler and the handler shall accept delivery of the agricultural commodity or shall commit for the future delivery of the agricultural commodity. Where the quantity of the agricultural commodity to be marketed is in dispute, the handler shall offer to accept for delivery a reasonable quantity of the agricultural commodity. This offer shall be made in writing to the accredited association at least 7 days prior to the start of the marketing period. A copy of this offer shall be sent by registered mail to the board. The accredited association may file a claim for relief with the board if it feels that the offer is unreasonable. The board shall determine the issue of reasonableness at a hearing in accordance with Act No. 306 of the Public Acts of 1969, as amended. This determination shall have priority over all other board matters. The board shall base its determination on: (a) Projections as to the quantity of the agricultural commodity to be produced, (b) the relationship between the quantity of the commodity available and the amount of the quantity accepted by the handler, (c) the kind, grade, and quality of the commodity available, and (d) the past practices of the handler in relation to the items in subdivisions (a), (b) and (c). If, upon the preponderance of the evidence, the board is of the opinion that the quantity is unreasonable, it shall order the handler to accept the quantity which the board finds to be reasonable. The finding of the board shall be final, subject to later modification by the joint settlement committee. This finding shall be enforced in accordance with the provisions of section 5. Within 15 days following the start of the marketing period for the agricultural commodity, the board shall establish a joint settlement committee to arbitrate the issues in dispute.

Committee; membership; selection.] (2) The committee consists of 1 committeeman selected by the association, 1 committeeman selected by the handler and 1 committeeman selected by the committeeman representing the association and the handler. This third committeeman shall be chairman of the committee. If the third committeeman cannot be agreed upon by the association and the handler committeeman, the board shall submit a list composed of the names of 5 persons knowledgeable in the marketing of the agricultural commodity from which the third committeeman shall be chosen. The selection shall be made by the association representative and the handler representative each striking 2 different names from the list. The remaining name shall be the person who serves as the third committeeman and as its chairman. The order of striking shall be determined by chance. (Mich. Comp. Laws §290.716.)

Sec. 17. The chairman shall call a hearing to begin within 15 days and give reasonable notice of the time and place of the hearing. The chairman shall preside over the hearing and shall take testimony. Upon application and for good cause shown, and upon such terms and conditions as are just, a person, having a substantial interest therein may be granted leave to intervene by the committee. Any oral or documentary evidence and other data deemed relevant by the joint settlement committee may be received in evidence. The proceedings shall be informal. Technical rules of evidence shall not apply and the competency of the evidence shall not thereby be deemed impaired. A verbatim record of the proceedings shall be made and the chairman shall arrange for the necessary recording service. Transcripts may be ordered at the expense of the party ordering them but the transcripts shall not be necessary for a decision by

the committee. The expense of the proceedings, including a fee to the chairman, established in advance by the board shall be borne equally by each of the parties to the dispute and the state. The hearing conducted by the arbitration panel may be adjourned from time to time, but, unless otherwise agreed by the parties, shall be concluded within 30 days of the time of its commencement. Its majority actions and rulings shall constitute the actions and rulings of the joint settlement committee. (Mich. Comp. Laws §290.717.)

Sec. 18. The committee may administer oaths, require the attendance of witnesses, and the production of such books, papers, contracts, agreements and documents as may be deemed by it material to a just determination of the issues in dispute, and for such purpose may issue subpoenas. If any person refuses to obey a subpoena, or refuses to be sworn or to testify, or if any witness, party or attorney is guilty of any contempt while in attendance at any hearing, the committee may, or the attorney general if requested shall, invoke the aid of any circuit court within the jurisdiction in which the hearing is being held, which court shall issue an appropriate order. Any failure to obey the order may be punished by the court as contempt. (Mich. Comp. Laws §290.718.)

Sec. 19. The committee within 20 days after the conclusion of the hearing or such further time to which the parties may agree shall make written findings of fact and issue its written award upon the issues presented to it and upon the record made before it, and shall mail or otherwise deliver a true copy thereof to the parties or their representatives. The award of the committee shall be limited to the last offer of the association or the last offer of the handler which more nearly complies with the criteria contained in section 20. (Mich. Comp. Laws §290.719.)

Sec. 20. The committee shall base its decision upon the following factors:

(a) Prices or projected prices for the agricultural commodity paid by competing handlers in the market area or competing market areas.

(b) Amount of the commodity produced or projections of production in the production area or competing marketing areas.

(c) Relationship between the quantity produced and the quantity handled by the handler.

(d) The producers cost of production including the cost which would be involved in paying farm labor a fair wage rate.

(e) The average consumer prices for goods and services, commonly known as the cost of living.

(f) The impact of the award on the competitive position of the handler in the marketing area or competing areas.

(g) The impact of the award on the competitive position of the agricultural commodity in relationship to competing commodities.

(h) A fair return on investment.

(i) Kind, quality or grade of the commodity involved.

(j) Stipulation of the parties.

(k) Such other factors which are normally or traditionally taken into consideration in determining prices, quality, quantity and the costs of other services involved. (Mich. Comp. Laws §290.720.)

Sec. 21. A majority decision of the committee, if supported by competent, material and substantial evidence

on the whole record, shall be final and binding upon the parties, and may be enforced, at the instance of either party or of the committee in the court of appeals. (Mich. Comp. Laws §290.721.)

Sec. 22. A party who wilfully disobeys a lawful order of enforcement by the court of appeals pursuant to section 21, or wilfully encourages or offers resistance to such order shall be in contempt. The punishment for each day the contempt persists, may be a fine fixed in the discretion of the court in an amount not to exceed $500.00 per day. (Mich. Comp. Laws §290.722.)

Sec. 23. Awards of the committee shall be reviewable by the court of appeals but only for reasons that the committee was without or exceeded its jurisdiction; the award is unsupported by competent, material and substantial evidence on the whole record; or the award was procured by fraud, collusion or other similar and unlawful means. The pendency of such proceeding for review shall not automatically stay the order of the committee. (Mich. Comp. Laws §290.723.)

Sec. 24. Within 30 days after an accredited association negotiates a contract with a handler or receives a committee award, it shall send to the board by registered mail a copy of the contract or award. (Mich. Comp. Laws §290.724.)

Sec. 25. (1) At all reasonable times the board shall have access to and the right to copy evidence relating to any person or action under investigation by it in connection with any failure or refusal to bargain or for engaging in unfair practices.

Compelling attendance, testimony and production of evidence; contempt.] (2) In case of contumacy or refusal to obey a subpoena issued to any person, the circuit court,

upon application by the board, shall have jurisdiction to order such person to appear before the board to produce evidence or to give testimony touching the matter under investigation, and any failure to obey such order may be punished by the court as a contempt.

Service of documents; witness fees and mileage.] (3) Complaints, orders and other processes and papers of the board may be served personally, by registered mail, by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return of service shall be proof of the service. Witnesses summoned before the board shall be paid the same fee and mileage allowance that are paid witnesses in circuit court and witnesses whose depositions are taken and the person taking the same shall be entitled to the same fees as are paid for like services in circuit court.

Service of process.] (4) All processes of any court of which an application or petition may be made under this act may be served at any place in the state wherein the person or persons required to be served reside or may be found. (Mich. Comp. Laws §290.725.)

Sec. 26. The activities of accredited associations and handlers in bargaining with respect to the price and other terms of sale of the agricultural commodities produced by the members of such accredited associations do not violate any antitrust law of this state. (Mich. Comp. Laws §290.726.)

6. LIST OF INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC. JOINED AS PARTIES PLAINTIFF

1. Burnette Farms Packing Company, now known as Burnette Packing Corporation
2. Chase Orchards, a proprietorship
3. Cherry Growers, Inc., a corporation
4. Cherry Hill Orchards, a corporation
5. Coloma Cooperative Canning Company, a corporation
6. Duffy-Mott Company, Inc., a corporation
7. Eau Claire Packing Company, a corporation
8. Elk Rapids Packing Company, a corporation
9. Flamm Pickle & Packing Co., Inc., a corporation
10. Food Industries of America, a corporation
11. Frigid Foods Products Inc., a corporation
12. Gerber Products Company, a corporation
13. Heifetz Pickling Co., Division of Green Bay Food Co., a corporation
14. H. J. Heinz Company, a corporation
15. Indian Summer, Incorporated, a corporation
16. Jebavy Sorenson Orchard Company, a corporation
17. Kroupa's Inc., a corporation
18. Lake Odessa Canning Company, a corporation
19. Morrison's, Inc., a corporation
20. Michigan Fruit Canners, Inc., a division of Curtis-Burns, Inc.

21. Mason County Cold Storage, Inc., a corporation
22. A. F. Murch Company, a corporation
23. Musselman Fruit Products, a division of Pet Incorporated, a corporation
24. National Fruit Product Co., Inc., a corporation
25. New Era Canning Company, a corporation
26. Oceana Canning Company, a corporation
27. Onekema Packing Company, a corporation
28. Ore-Ida Foods, Inc., a corporation, a subsidiary of H. J. Heinz Co.
29. Packer's Canning Co., Inc., Honee Bear Div., a corporation
30. Paw Paw Grape Juice Co., a division of Warner Vinyards, a corporation
31. Peninsula Fruit Exchange, Inc. a corporation
32. Plainwell Canning Company, a corporation
33. Sawyer Fruit and Vegetable Cooperative Corporation, a corporation
34. Sherman Canning Co., a corporation
35. Silver Mill Frozen Foods, Inc., a corporation
36. Smeltzer Orchard Co., a corporation
37. Speas Company, a corporation
38. Spielmann Vinegar Company, a corporation
39. Stanek & Sons, Inc. a corporation
40. Stokeley-Van Camp, Inc., a corporation
41. Traverse City Canning Company, a corporation

42. United Foods, Inc., a corporation

43. Vlassic Foods, Incorporated, a subsidiary of Campbell Soup Company, a corporation

44. R. C. Warren & Company, Inc., a corporation

Office - Supreme Court, U.S.
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DEC 1 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1577

In the Supreme Court of the United States

October Term, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC.; and FERRIS PIERSON,
Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JOINT APPENDIX

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Probable Jurisdiction Noted October 17, 1983
Appeal Docketed March 22, 1983

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NOTE: As allowed by Rule 30.1, materials contained in the jurisdictional statement are not reproduced in the joint appendix. In such cases, reference is made to the page of the jurisdictional statement appendix ("J.S. App") at which the materials may be found.

INGHAM COUNTY CIRCUIT COURT
CIVIL DOCKET

Case No. 74-16369-CZ

Date	Proceedings
3/7/74	Complaint filed
3/7/74	Summons Issued
4/26/74	Order of Dismissal as Per Opinion of the Court - LOB 158, pp. 414, 415 filed
5/3/74	Opinion of the Court Re: Order to Enter Granting Defendants' Motion For Dismissal filed LOB 157, pp. 308, 309, 310
5/14/74	Application for Leave to Appeal and Designation of Appeal as Emergency Appeal Under GCR 1963, 806.5 with Proof of Service filed
5/14/74	Claim of Appeal with Proof of Service filed
10/28/74	Order from Court of Appeals Granting Motion to Dismiss Appeal, and Order Dismissing Motion to Expedite Appeal and Motion for Limited Remand filed
10/28/74	Order from Court of Appeals Granting Motion for Immediate Consideration; and Order Denying Leave to Appeal from Judgment of Circuit Court and Order Dismissing Motion to Expedite Appeal and for Limited Remand filed
1/20/75	Order from Supreme Court Granting Application for Leave to Appeal filed
12/13/76	Order from Supreme Court of State of Michigan Reversing Judgment of Circuit Court and Remanding to Circuit Court for Further Proceedings filed
12/13/76	Order from Supreme Court of State of Michigan Denying Application for Rehearing filed

Date	Proceedings
6/27/77	Answer of Defendant Michigan Agricultural Cooperative Marketing Association, Inc. filed
6/29/77	Verified Answer of Defendant, Agricultural Marketing and Bargaining Board with Proof of Service filed
9/6/77	Trial before the Court without a jury—Proofs in Part J 109 pg. 62
9/7/77	Trial Continued—Proofs in Part J 109 pg. 63
9/8/77	Trial Continued—Proofs in Part J 109 pg. 64
9/12/77	Trial Continued—Proofs in Part J 109 pg. 69
9/13/77	Trial Continued—Proofs in Part J 109 pg. 70
9/19/77	Trial Continued—Proofs in Part J 109 pg. 78
9/20/77	Trial Continued—Proofs in Part J 109 pg. 79
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9/22/77	Trial Continued—Proofs in Part J 109 pg. 81
9/26/77	Trial Continued—Proofs in Part J 109 pg. 86
9/26/77	Trial Concluded—Taken Under Advisement - J 109 pg. 87
2/2/81	Opinion of the Court filed
3/31/81	Order filed
3/9/83	Notice of Appeal to the Supreme Court of the United States and Proof of Service filed
3/11/83	Supreme Court Order that the Agricultural Marketing and Bargaining Act is constitutional and that the accreditation procedures of the Agricultural Marketing and Bargaining Act are subject to the provisions of the Administrative Procedures Act filed

COURT OF APPEALS DOCKET

Case No. 20309

Date	Proceedings
5/14/74	Claim of Appeal filed
5/14/74	Motion to Expedite Appeal
5/21/74	Motion to dismiss claim of appeal
10/22/74	Order granting motion to dismiss; dismiss motion to expedite as moot
11/12/74	Application for Leave to Appeal to Supreme Court filed
1/15/75	Application Granted
8/30/76	Opinion of Supreme Court filed
12/14/76	Order of Supreme Court certified 12/9/76 reversed and remanded to Ingham County Circuit Court

COURT OF APPEALS DOCKET

Case No. 20310

Date	Proceedings
5/14/74	Application for Leave to Appeal
5/14/74	Motion for immediate consideration, and motion for expedited appeal
10/22/74	Order granting motion for immediate consideration; denying application for leave to appeal; denying motion to expedite
11/12/74	Application for Leave to Appeal to Supreme Court filed
1/15/75	Application Granted
8/30/76	Opinion of Supreme Court filed
12/14/76	Order of Supreme Court certified 12/9/76 reversed and remanded to Ingham County Circuit Court

MICHIGAN SUPREME COURT DOCKET

Case No. 56434

Date	Proceedings
11/8/74	Application filed
12/2/74	Brief in opposition filed
1/15/75	Application Granted with instructions regarding issues and making a record
10/10/75	Argued and submitted
8/25/76	Reversed and remanded, jurisdiction retained
9/13/76	Application for rehearing filed
9/13/76	Motion for clarification of opinion filed
11/1/76	Motion for clarification GRANTED with instruction, motion to amend complaint GRANTED
12/9/76	Application for rehearing DENIED
2/6/81	Circuit court opinion on remand filed
6/4/81	Argued and submitted # 10
12/23/82	Opinion—statute constitutional (opinion released 2/1/83)
3/4/83	Remittitur and circuit court record returned
3/8/83	Notice of appeal to US Supreme Court filed
3/22/83	Notice from US Supreme Court of filing of appeal

EXCERPTS FROM THE TESTIMONY OF RANDALL TORGERSON

Taken in the Ingham County Circuit Court

(Filed September 26, 1977)

[Caption Omitted In Printing]

Proceedings had and taken before the Honorable Thomas L. Brown (P11303), Circuit Court Judge, at the Ingham County Circuit Courtroom, City Hall, Lansing, Michigan, on Wednesday, September 21, 1977.

Appearances: Ernest M. Sharpe, Esq., in behalf of plaintiffs

James A. White Esq. in behalf of defendant Michigan Agricultural Cooperative Marketing Association

Henry J. Boynton Esq. in behalf of defendant Michigan Agricultural Marketing and Bargaining Board

• • •

[1071] RANDALL TORGERSON Ph. D.

having first been duly sworn testified as follows:

DIRECT EXAMINATION

BY JAMES A. WHITE Esq.:

Q. Would you please give your full name and address for the record? A. Yes, Randall Everett Torgerson, 1300 Tulane Drive, Alexandria, Virginia.

Q. And, Dr. Torgerson, with whom are you employed? A. I'm employed by the Farmer Cooperative Service, U.S. Department of Agriculture.

Q. And what position do you hold? A. I'm Administrator of the agency.

• • •

[1074] Q. Okay. And when did you get your present position? A. I was asked by the Secretary of Agriculture to take on the job as Administrator of the Farmer Cooperative Service in October, 1975, and have been in that position since that time.

Q. Okay. Dr. Torgerson, have you published any books? A. I have two books "Producer Power at the Bargaining Table: A Case Study of the Legislative Life of Senate Bill S-109," published by the University of Missouri Press in 1970. I also published a book entitled "Farm Bargaining," which is a case study of bargaining efforts in Norway and Sweden. That was published by the Landbruksforlaget in Norway in 1971.

Q. Okay. Dr. Torgerson, I believe one book you mentioned that you are the author of is "Producer Power at the Bargaining Table: A Case Study of the Legislative Life of Senate Bill 109." Could you explain to the Court what that is, S-109? A. Well, S-109 was the popular bill name for what is now the [1075] Agricultural Fair Practices Act of 1967. It was signed into law in 1968, and it was a study of the kind of pulling and pushing that went on in the Legislature with that Bill from 1967 until it was signed into law in 1968 by President Johnson.

Q. Have you written, in addition to those books, have you written other articles regarding agricultural marketing and bargaining? A. Yes, I've written a number of articles and had many speeches on group action in agriculture published in various periodicals.

• • •

[1103] Q. Okay. Now, one of the arguments that have been made by the Plaintiffs, and they have a section in their Brief dealing with pre-emption of the Michigan Act by the Federal Fair Practices Act, which was ap-

parently this Act S-109 that you wrote your book on? A. Right.

Q. And in there, in the section of their trial Brief, they have opined that it is impossible to comply with the Michigan Act without triggering federal enforcement action, and that such [1104] federal enforcement shows that the Michigan Act would be in actual conflict with the federal law. Now, as the administrator for the Farmer Cooperative Service for the United States Department of Agriculture, do you have any knowledge as to the likelihood of federal action seeking to prevent the operation of the Michigan Act such as a federal action being based on the contention that the Michigan Act is in conflict with the federal act? A. Yes, I do.

Q. Okay. Now, what is your opinion in that regard? Do you have knowledge in that regard, then?

MR. SHARPE: Your Honor, at this point I'd like to object to that question. First of all, it hasn't been shown that this witness is in a position to make a determination wheher indeed enforcement action will be brought; secondly, this witness is being asked a conclusion of law whether—related to whether one act pre-empts another act. That's the issue here, not whether action will be brought or will not be brought. He's been qualified as an economist, not as a lawyer. He hasn't been—he is not listed as one of the attorneys in this case, he's not been listed as the judge; I don't think he's qualified to render an opinion on the pre-emption question, which is, I believe, strictly a matter of law.

THE COURT: I don't understand Mr. White's [1105] question to ask him whether he has an opinion on the pre-emption aspect, but whether the likelihood of the federal action. I think I'd have to sustain the objection to the

extent there is a lack of foundation. I don't know what his connection is with the Justice Department or whoever would bring this sort of action.

MR. WHITE: I'd be happy to ask him that.

THE COURT: All right.

Q. (MR. WHITE) Dr. Torgerson, did you receive a copy—did our office send you a copy of the trial Brief that was written in this case? A. Yes, dated Sepember 6, 1977, yes.

Q. Okay. Now, did you take that as the administrator of the Farmer Cooperative Services of USDA, did you take that to the attorneys that you deal with for the USDA? A. I did, with a copy of the Michigan Bargaining Act.

Q. Okay. Then did they give you an opinion as to whether they would enforce, as the attorneys, what you should do regarding the enforcement of this?

THE WITNESS: Yes, they did give me an opinion.

MR. WHITE: Okay, what was that opinion?

MR. SHARPE: Objection, hearsay.

• • •

[1107] THE COURT: Well, the material fact before the Court is not whether the Michigan Act pre-empts the federal act, but the material fact is whether or not the federal authorities intend to take some action as alleged by the Plaintiffs against the Michigan Act. Now, it seems to the Court that the statement which certainly is out of court—the declarant is out of court, not available for cross examination, [1108] and the declarant is clearly the attorneys representing the U.S. Department of Agriculture. But it appears that the statement is more probative on the

point, on that point than any other evidence which could be readily procured through reasonable efforts. So I think it bears a certain reasonable reliability. I doubt very much the administrator for that section of the USDA would appear here and not indicate to us what he was advised by attorneys for the Department. I don't think we need go beyond why they have that belief, I mean they can be subpoenaed for that purpose, for the purpose of material acts before us, I think it's the exception to the hearsay rule, and I will overrule the objection.

MR. SHARPE: Your Honor, could I also make one other statement? I believe it's irrelevant simply whether a federal agency would enforce a statute really is not determinative of the question of whether one statute pre-empts another, whether one statute violates another, is inconsistent with one another.

THE COURT: I'm not indicating that what has been offered as a material fact here has any bearing on the pre-emption issue. That apparently is not before me; it's not part of the question.

MR. WHITE: I think the Supreme Court has indicated that pre-emption argument is.

THE COURT: That may be, it's not part of your [1109] question, you're not asking the witness that question; that's not the material fact here. All right, let's adjourn for lunch. Mr. White is going to take you to lunch.

Q. (MR. WHITE) Dr. Torgerson, just before we broke for lunch, I was asking whether as a result of the activities that you have described, it's likely that the U.S. Department of Agriculture would seek to prevent the operation of Michigan Act 344 of the Public Acts of 1972, and I believe the ruling was you could go ahead with that. Okay, would you answer that, then? A. It's very unlikely.

THE COURT: Now, wait, I note on the record that's based on the foundation of the matters previously stated.

MR. WHITE: Yes, that's right, yes.

• • •

CROSS EXAMINATION

[1128] Q. (By Mr. Sharpe) Let me pick up something else. You mentioned that you apparently talked to somebody in the Justice Department or the USDA, and they told you that they wouldn't bring an action against anybody because they were operating under this Act, isn't that right? A. I testified that on the basis of my appearance here, as I frequently do in my role as administrator of Farmer Cooperative Service, since legal issues come up, you know, not infrequently, that I sent a copy of the Plaintiffs' Trial Brief, September 6, 1977, and a copy of PA 344 to our marketing contact in the Office of General Counsel of USDA and asked them to review and study that particular item and to advise me on [1129] what I could or could not say in testimony. That's what I did.

Q. That was something you did getting ready to testify for this case, then? A. In part, but we also are in a situation where we are kind of looking out for potential sources of conflicts and what have you between state and federal levels. It's not infrequently that we go to our general counsel for questions of clarification of that nature, irregardless of whether there is a case involved or not.

Q. And you were told nothing would be done? A. That is correct, I was told that there's no appearance here of conflict between statutes.

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No. 82-1577

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1982

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC.; and FERRIS PIERSON,
Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC.,
Appellees.

On Appeal From the Supreme Court of Michigan

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF

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QUESTION PRESENTED

Is the Michigan Agricultural Marketing and Bargaining Act in conflict with and therefore preempted by the Federal Agricultural Fair Practices Act of 1967?

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No. 82-1577

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1982

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC.; and FERRIS PIERSON,

Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC.,

Appellees.

On Appeal From the Supreme Court of Michigan

MOTION TO DISMISS OR AFFIRM

Appellee The Agricultural Marketing & Bargaining Board moves that this Honorable Court dismiss the appeal herein or, in the alternative, affirm the judgment of the Michigan Supreme Court, on the grounds that it is manifest that the question on which decision of this appeal depends is so unsubstantial as not to require further argument.

COUNTERSTATEMENT OF THE CASE

A. Nature of the Case

In 1967, Congress enacted the Federal Fair Practices Act of 1967, 7 USC §§ 2301 *et seq* (hereafter the "Federal Act")

[Appellant's Appendix at A 84, hereafter "App A-84"] In its findings and declaration of policy the Federal Act states that it is the policy of Congress to "establish standards of fair practices required of handlers in their dealings in agricultural products." [App A-84] The Federal Act seeks to accomplish this goal by defining prohibited practices by handlers and granting the United States Department of Agriculture authority to enjoin such practices.

In 1972 the Michigan Legislature enacted the Agricultural Marketing and Bargaining Act, 1972 PA 344, as amended, MCLA 290.701 *et seq;* MSA 12.94(101) *et seq* (hereafter "Michigan Act"). [App A-89] The Michigan Act is enabling legislation which affords farmers the option of joining together and bargaining collectively. Like the Federal Act the Michigan Act defines prohibited practices by handlers. Both acts seek to foster and promote the efficient production and marketing of agricultural products by protecting the marketing and bargaining position of the individual producers. While the Federal Act attempts to do this solely through limiting handler coercion the Michigan Act extends into an area not regulated by Congress. Under the Michigan Act a framework for a marketing and bargaining procedure is instituted should a majority of the farmers producing a majority of the argrcultural commodity so choose. The Michigan Act is not preempted because it does not stand as a obstacle to the full purposes and objectives of the Federal Act.

B. **Parties**

Appellee Agricultural Marketing and Bargaining Board accepts Appellants Statement of the Case as it relates to the Parties.

C. Proceedings Below

Appellee Agricultural Marketing and Bargaining Board accepts Appellants' Statement of the Case with respect to the proceedings below.

ARGUMENT

I.

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

A. Congress Has Not Preempted The Field With Regard To Agricultural Marketing

The doctrine of federal pre-emption has its roots in Art VI, Clause 2 of the United States Constitution, the "Supremacy Clause", which elevates federal law above that of the states. On the other hand, under the 10th Amendment of the federal constitution, "the powers not designated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people".

Any analysis of whether Federal pre-emption has occurred must "start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress". *Rice* v *Sante Fe Elevator Corporation*, 331 US 218, 230; 67 S Ct 1146; 91 L Ed 1447 (1947). Only when Congress has unmistakably so ordained that its enactments alone are to regulate a part of commerce, must state laws regulating that aspect of commerce fall. *Florida Lime and Avocado Growers, Inc.* v *Paul*, 373 US 132, 142; 83 S Ct 1210; 10 L Ed2d 248 (1963). Such a result will follow when Congress' command is explicitly stated in the statute's language or implicitly con-

tained within its structure and purpose. *Jones* v *Rath Packing Corporation*, 430 US 519, 525; 97 S Ct 1305; 51 L Ed2d 604 (1977).

Appellants correctly note that Congress did not intend to occupy the entire field of regulation or prohibit the states from enacting laws relating to agricultural marketing inasmuch as the Federal Act, 7 USC 2305(d) specifically states:

> "The provisions of this Chapter shall not be construed to change or modify existing state law nor to deprive the state courts of jurisdiction." [App A-88]

This manifest declaration of non-pre-emption represents a congressional intent not to intrude upon a state's regulation of agricultural marketing and bargaining and thereby to establish a policy favorable to state regulation.

B. No Conflict Exists Between The Federal Act and Michigan Act.

"Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute." *Ray* v *Atlantic Richfield*, 435 US 151, 158; 98 S Ct 988; 55 L Ed2d 197 (1978). A conflict will be found where compliance with both Federal and state regulations is a physical impossibility or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. See, *Florida Lime and Avocado Growers Inc* v *Paul, supra* and *Jones* v *Rath Packing Corp, supra*, at 526, 541-542.

Appellants allege a conflict between the State Act and the Federal Act which is twofold. First, it is argued that the Michigan Act destroys the "farmer's right not to join or bargain

through a cooperative", a "right" said to be created by 7 USC § 2303(a). Second, it is argued that the Michigan Act eliminates the "handlers right to deal individually with a farmer", a "right" said to be created by 7 USC § 2304. A review of these sections, however, shows that no such rights were created and the Federal Act and Michigan Act are entirely consistent with one another.

C. **The Federal Act Creates No Absolute Right In Farmers To Join Or Not Join Or Bargain Through A Cooperative**

7 USC 2303(a) provides:

> "It shall be unlawful for any *handler* knowingly to engage or permit any employee or agent to engage in the following practices:
>
> (a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers, or to refuse to deal with any producer because of his right to join and belong to such an association; . . . . "

(Emphasis added) [App A-85]

Clearly, the above section is, as the Michigan Supreme Court noted [App A-10, fn 13 and text], specifically directed toward handler misconduct. The sole purpose of 7 USC §2303 is to define prohibited practices by handlers. 7 USC §2303(a) most certainly makes it unlawful for a handler to coerce a producer to either join or not join an association of producers. Such a prohibition, however, does not forbid a state from requiring exclusive representation of individuals where a majority of the producers, producing a majority of the agricultural commodity, so desire.

Nor does 7 USC § 2303(a) grant the producer an absolute right to deal directly with a handler. Its' sole purpose was to protect a producer from being unduly influenced by a handler in deciding whether or not to join a cooperative association. Hand Congress intended to instill in the producer a right to deal directly with the handler it is submitted it would have done so in a clear and unequivocal fashion and not in the circuitous manner which is being urged by Appellants.

D. The Federal Act Creates No Right In The Handlers To Deal Directly With An Individual Producer

(1) Legislative History

The second alleged "conflict" is the "handler's right to deal individually with a farmer", a right said to arise out of 7 USC § 2304, the disclaimer section of the Federal Act which provides:

> "Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producers membership in or contract within an association of producers, nor require a handler to deal with an association." [App A-86]

At the outset it should be understood that the Michigan Act does not require a handler to select or purchase from a particular producer. Nor does the Michigan Act prohibit a handler from purchasing from any producer it wishes. Finally a handler is not necessarily required to deal with the accredited association inasmuch as the Michigan Act affords to the handler the opportunity to "opt out" of negotiations. See 1972 PA 344, § 15, *supra*. [App A-105]

The Michigan Supreme Court correctly interpreted 7 USC § 2304 stating:

"The language of § 2304 does not justify the meaning plaintiffs assign to it. The disclaimer provisions, rather than having an operative effect, is essentially explanatory, beginning as it does with the phrase '[n]othing in this chapter', referring to the substantive and affirmative provisions of FAFPA. It neither requires nor prevents bargaining between handlers and individual producers or associations of producers. We do not discern from a provision termed a 'disclaimer of intention' a positive congressional intent to prohibit the conduct said not to be regulated. There is no logical nexus between a provision declaring 'this is what we did not do' and the conclusion that 'what we did not do, cannot therefore be done'. Section 2304 is nothing more than an explanation of what FAFPA was not intended to do. It did not, in disclaiming any 'Intention to prohibit normal dealing', thereby create or affirmatively protect an individual handler's right to bargain with any producer, or an individual producer's right to bargain for himself. It is simply, aside from the disclaimer neutral on *that* point. Section 2304 cannot fairly be read as a statement of congressional intent to prohibit exclusive bargaining by producer associations. It is simply a statement indicating that FAFPA did not promulgate an exclusive bargaining system for marketing a producer's agricultural commodity."

[App A-8.]

The announced congressional finding and declaration of policy in 7 USC § 2301 supports such an interpretation as there is no evidence of Congressional intent to affirmatively create in the handler a right to deal individually with the farmer. 7 USC § 2301 states:

"Agricultural products are produced in the United States by many individual farmers and ranchers scattered throughout the various States of the Nation. Such products in fresh or processed form move in large part in the channels of interstate and foreign commerce, and such products which do not move in these channels directly burden or affect interstate commerce. The efficient production and marketing of agricultural products by farmers and ranchers is of vital concern to their welfare and to the general economy of the Nation. Because agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law. Interference with this right is contrary to the public interest and adversely affects the free and orderly flow of goods in interstate and foreign commerce.

It is, therefore, declared to be the policy of Congress and the purpose of this chapter to establish standards of fair practices required of handlers in their dealings in agricultural products." [App A-84]

The aim of the Federal Act, which is testified to by the above-quoted section, is simply to protect farmers from handler coercion.

Further evidence that the Federal Act was not intended to affirmatively create rights can be found in its legislative history. The report of then Secretary of Agriculture Freeman to the Senate Committee on Agriculture and Forestry in support of the Federal Act demonstrates that its goal was to enhance producer bargaining power and not to create rights to deal individually. The Secretary's report, as contained in

1968 US Code Congressional and Administrative News, p 1875 states:

"Cooperative action in agricultural production and marketing is increasing. It is growing in response to the need, (1) to achieve more orderliness and efficiency in production and marketing, and (2) to protect and improve bargaining relationships between producers and marketing firms in the face of major changes taking place in the marketing system.

These changes include the growing integration of production and marketing of agricultural products, the increased control of those functions by large, diversified corporations and the expanded use of contracting by such corporations to meet their needs. Developments such as these weaken the marketing and bargaining position of individual producers.

It is essential to protect the rights of producers to join together in cooperatives to perform necessary marketing operations, including bargaining with processors and other buyers over the terms of sale of the producers' farm products. Cooperative bargaining has come into prominence as the old market system is being displaced by contractual arrangements in the production and marketing of agricultural products. We believe these trends will continue.

The proposed bill would materially strengthen farmers' ability to bargain and market effectively. It will reaffirm the right of producers to join together and operate cooperatives without interference. It will remove some of the impediments confronting producers in organizing and operating their cooperative associations.

Producers have suffered harassment and reprisal by some processors because of activity in organizing and joining a cooperative. Grower contracts have been canceled or reduced in volume. Processors have offered inducements to growers not to join a cooperative. Attempts have been made to buy off the cooperative's leaders to create dissension in the organization.

Processors operating in several production areas have coerced growers desiring to form a bargaining cooperative by threatening to leave the cooperative's territory and expand operations elsewhere. Growers have failed to get redress after such questionable processor actions.

If this bill were enacted, many producers who fear harassment or discrimination would feel free to join a cooperative association. It should help producers use cooperatives as a more effective tool in marketing their products." 1968 US Code Cong & Ad News, p 1875.

The Secretary's interpretation is underscored by the Committee Report on 7 USC § 2304.

"Section 5[§ 2304] disclaims any intent to prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in an association of producers, or to prevent handlers and producers from dealing with one another individually on a direct basis, or to require a handler to deal with an association of producers. The bill does not prevent or require these actions and is not intended to do so. While the proponents of the bill state in their testimony that this was not the purpose, there was some concern, especially on the part of processors and other purchasers of agricultural products, that the bill in fact went further than intended. The Committee felt that a clean state-

ment in the bill itself would be helpful to courts, handlers, associations, producers, and others in their construction of this legislation; and has recommended inclusion of this section in the bill.

There are many good, sound economic reasons for handlers and producers to select customers and suppliers. The bill does not attempt to prevent these sound reasons from operating.

While the bill does not prevent handlers and producers from dealing with one another individually on a direct basis, it does prevent handlers from exerting any improper pressure in an effort to weaken associations or discourage membership. While the bill does not require a handler to deal with an association of producers, it certainly makes clear that farmers have a right to form such associations and should be protected in the exercise of this right. The fact is clear that an association of producers which has obtained the voluntary membership of a large number of farmers deserves respect and recognition by the handler of agricultural products." HR Rep No 824, S Rep No 474, 90th Cong 2d Sess, reprinted in 1968 US Code Cong & Ad News, p 1873.

Given this legislative history of 7 USC 2304 the Michigan Supreme Court was correct in concluding:

> "Section 2304's disclaimer of any congressional intent to affect preexisting freedom to deal individually cannot be read as a creation of new rights or an express new statutory protection of old rights; nor can it be read as precluding a state from choosing to adjust pre-existing freedom to deal." [App A-14]

(2) **Case Law**

Appellants argue that two federal cases represent authority for the proposition that a handler has a "right" to deal directly with an individual producer. *Garrison* v *Dairymen, Inc,* Civ. Action No. 80-1080-3, slip opinion (D SC, July 28, 1980) involved producers of milk who sought an injunction against a handler who refused to accept their milk unless they joined an association of milk producers. *Butz* v *Lawson Milk Co,* 386 F Supp 227 (ND Ohio 1974) concerned a handler that refused to deal with a producer who had assigned to a producer association the exclusive right to sell his milk. Even though both Courts ruled against handler coercion Appellants argue that in so doing the "right of the handler to deal individually" was found. Such an argument is directly traceable to *Butz, supra.* However, upon a close reading of that case it is clear that the "right" to which the Court was referring was not a statutory right at all.

In *Butz, supra,* a producer of milk had contracted with Lawson, a processor handler. Under the terms of the contract the producer was not under any agreement with an association to sell for him any milk which he produced. The contract further provided that should the producer enter into an agreement which would authorize an association to sell his milk, Lawson would be relieved of all further obligations to purchase from the producer. Subsequently, the producer did enter into a marketing agreement with an association.

The terms of the marketing agreement appointed the association as the sole and exclusive agent to sell all milk produced by the producer unless the producer secured written consent from the association to do otherwise. In addition, the marketing agreement provided that all other agreements or contracts with respect to the sale of milk were superseded so long as no conflict occurred with existing contracts. In the

event that a conflict did occur between the marketing agreement and a pre-existing contract the marketing agreement provided that the producer agreed to terminate such a contract at the earliest possible date. When notified that the producer entered into a marketing agreement, Lawson immediately terminated its contract with the producer.

The ultimate conclusion of the Court was that Lawson's termination of its contract with the producer was unlawful and in violation of 7 USC § 2303(a) in that it represented a refusal to deal with the producer solely because of his joining the association. This result was based on the fact that under the terms of the contract and marketing agreement the producer might have been permitted to deal directly with Lawson despite the marketing agreement with the association. The Court's statement that 7 USC § 2304 is "to protect the right of the handler to continue to deal with one of its producers directly even though he many become a member of an association", *Butz, supra* at p 227, was in reference to the pre-existing contractual right with the producer which was still viable despite the fact that the producer had entered into a marketing agreement with the association. It was not a finding that 7 USC § 2304 created a right in that handler, or any other, to deal individually with the producer.

Neither *Garrison, supra* or *Butz, supra* stand for the proposition that the Michigan Act's requirement for exclusive representation for all growers of an agricultural commodity is in conflict with the Federal Act.

Finally, any doubt as to whether compliance with both the Federal and Michigan Acts is a physical impossibility was resolved at trial. This is due to the fact that the operation of marketing and bargaining under the Michigan Act will not "trigger" federal enforcement action under Federal Act. This

fact was noted by the Circuit Court when it stated in its opinion:

> "The plaintiffs have directed the Court to *Jones* v *Rath Packing, supra,* for the proposition that the federal government has preempted the field of regulation. This case, as the Court understands it, stands for the proposition that state law must fall if it 'triggers' federal enforcement action.
>
> *There is nothing in the proofs which would convince the Court of this possibility. In fact the proofs appear to the contrary. Witness Torgerson, a USDA official, indicated compliance with AMABA would not 'trigger' federal enforcement of AFPA"*
>
> (Emphasis added) [App A-74]

In light of the foregoing it is abundantly clear that the Michigan Act is not pre-empted by the Federal Act and that the claim of unconstitutionality alleged by appellants is so unsubstantial as not to warrant further consideration by this Court.

CONCLUSION AND PRAYER

WHEREFORE, Appellee Agricultural Marketing and Bargaining Board respectfully submits that the question upon which this cause depends is so unsubstantial as not to require further argument and said Appellee respectfully moves that this Honorable Court dismiss the appeal herein, or in the alternative affirm the judgment of the Michigan Supreme Court.

Respectfully submitted,

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No. 82-1577

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October Term, 1982

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Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC. ("MACMA")

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

MOTION TO DISMISS

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MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC.; and FERRIS PIERSON,

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

MOTION TO DISMISS

Defendant-Appellee Michigan Agricultural Cooperative Marketing Association, Inc. ("MACMA")[1] moves, pursuant to Rule 16 of the Rules of the Supreme Court, that the appeal herein be dismissed on the ground that the question on which the decision of the cause depends is so unsubstantial as not to require further argument.

1. MACMA was organized as a Michigan cooperative corporation for purposes of providing agricultural commodity marketing services for its farmer members. It is affiliated with the Michigan Farm Bureau, a non-profit corporation which owns a majority of the voting (common) stock of MACMA.

OPINION BELOW

The final opinion of the Michigan Supreme Court, dated December 23, 1982, is set forth in the appendix of Appellants' Jurisdictional Statement.

JURISDICTION

The jurisdictional requisites are set forth in Appellants' Jurisdictional Statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent constitutional and statutory provisions are set forth in Appellants' Jurisdictional Statement.

COUNTER-STATEMENT OF THE CASE

After concluding that the marketing and bargaining position of individual farmers would be adversely affected unless their right to join together was afforded greater protection, Congress passed the Agricultural Fair Practices Act of 1967, 7 U.S.C. §2301 *et seq.* That Act strengthened the rights of individual farmers to join together for their mutual benefit by providing legal sanctions against handlers who might discriminate against farmers because of their membership in producer associations.

In 1972 the Michigan Legislature passed the Agricultural Marketing and Bargaining Act, 1972 P.A. 344, Mich. Comp. Laws §290.701 *et seq.* The Michigan Act shares the Federal Act's purpose of permitting individual

farmers to improve their marketing and bargaining position by bargaining collectively with handlers. The Michigan Act provides a procedure by which an association which represents a majority of farmers producing a majority of an agricultural commodity may become accredited as the exclusive bargaining representative, in negotiations with handlers, of all farmers who produce a certain commercial quantity of the commodity. In permitting a majority of affected farmers to choose this exclusive representation system the Michigan Legislature regulated in an area that had been previously left unregulated by Congress in its passage of the Federal Act.

The Michigan Act is not preempted because it does not conflict with the Federal Act.

ARGUMENT

The Case Presents No Substantial Question

After acknowledging that (1) the Michigan Act ("AMABA") and the Federal Act ("FAFPA") share a common general purpose, i.e., to protect a farmer's right to join a cooperative association and to bargain collectively with processors through that association, and that (2) the FAFPA left some latitude for regulation by the states, Appellants have asserted that the AMABA is preempted because of an "apparent conflict" (Jurisdictional Statement at 9) between it and the FAFPA. The Michigan Supreme Court unanimously rejected Appellants' contentions that (1) AMABA stands as an obstacle to the accomplishment of the full purposes and objectives of Congress as expressed in FAFPA and that (2) the simultaneous compliance with both statutes was impossible. Because of the rule against seeking out conflicts between state

and federal regulations where none *clearly* exists (*Huron Portland Cement Co.* v *Detroit*, 362 U.S. 440, 446 (1960)), it is apparent that the question raised by Appellants is so unsubstantial as not to warrant plenary consideration by this Court.

In an effort to circumvent the holdings of this Court requiring a clear manifestation of intention by Congress to preempt state law, as must be evidenced by an unambiguous *actual* conflict between federal and state statutes, Appellants argue that Congress in FAFPA struck a "balance" by protecting conflicting interests of farmers and handlers (11, 24). Appellants then complain that AMABA upsets this purported "balance" and that the Michigan Supreme Court erroneously failed to identify such balance after all the legislative history and individual provisions of FAFPA were carefully reviewed by it. To support their balance theory, and the alleged error of the Michigan Supreme Court in failing to recognize it, Appellants set forth three arguments.

Appellants' first argument is that FAFPA protects a farmer's right *not* to join a cooperative association and that the AMABA "destroys this right" (12). In considering this argument it is important to keep in mind the following congressional findings and declaration of policy, expressed in the FAFPA itself, which demonstrate that notwithstanding a farmer's admitted right to refrain from formally joining an association, the primary purpose of FAFPA was to strengthen farmers' rights to bargain collectively with processors:

> "Because agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by

law. Interference with this right is contrary to the public interest and adversely affects the free and orderly flow of goods in interstate and foreign commerce." 7 U.S.C. §2301.

The Michigan Supreme Court did not hold, as Appellants now say, that §2303 of FAFPA "created no right to refrain from joining the association" (26). This argument misconstrues the Michigan Supreme Court's correct observation that §2303 "protects a producer from being unduly influenced *by a handler* in deciding whether or not to join a cooperative marketing association". Jurisdictional Statement, A10 (emphasis in original). Indeed, there can be no conflict between FAFPA and AMABA on the issue of a farmer's right *not to join* a cooperative association because AMABA also explicitly protects this right. Mich. Comp. Laws 290.704.

In an attempt to support their argument that the exclusive representation provisions of AMABA destroy a farmer's right not to join a cooperative association, Appellants refer to the AMABA system as a "closed union shop" (11). This argument not only ignores the distinction between an agency shop and a union shop but, more significantly, ignores the critical fact that a bargaining unit member, who is bound by the bargaining of his exclusive bargaining representative and who is required to financially support this representative with a service fee, is not being unlawfully coerced, as contemplated and prohibited by FAFPA and AMABA, into joining a cooperative association.

While Appellants state that the Michigan Supreme Court improperly equated the terms "handler" and "processor" (16), the footnote from the Michigan Supreme Court Opinion which Appellants cite reveals that said

Court was aware of the technical difference between the two terms. We submit that the Supreme Court merely pointed out that such difference was not pertinent to its ruling because that Court knew that the AMABA, like FAFPA, *expressly* protected a farmer's right to refrain from joining, as well as the right to join, a cooperative association.

Appellants' second argument is that the AMABA "completely eliminates the rights of individual farmers and purchasers to deal directly with one another" (11). Appellants have argued that Congress affirmatively created a federal right in a statutory provision that expressly stated what the Congress was *not* doing. The Michigan Supreme Court found no ambiguity in this disclaimer provision of FAFPA, §2304, and correctly observed (A8) that:

> "The language of §2304 does not justify the meaning plaintiffs assign to it. The disclaimer provision, rather than having an operative effect, is essentially explanatory, beginning as it does with the phrase '[n]othing in this chapter', referring to the substantive and affirmative provisions of FAFPA. It neither requires nor prevents bargaining between handlers and individual producers or associations of producers. We do not discern from a provision termed a 'disclaimer of intention' a positive congressional intent to prohibit the conduct said not to be regulated. There is no logical nexus between a provision declaring 'this is what we did not do' and the conclusion that 'what we did not do, cannot therefore be done'. Section 2304 is nothing more than an explanation of what FAFPA was not intended to do. It did not, in disclaiming any 'Intention to prohibit normal dealing', thereby create or affirmatively protect an individual

handler's right to bargain with any producer, or an individual producer's right to bargain for himself. It is simply, aside from the disclaimer neutral on *that* point."

While the Michigan Supreme Court was correct in noting that "Section 2304 cannot fairly be read as a statement of congressional intent to prohibit exclusive bargaining by producer associations" (A8), Appellants ignore the fact that the Michigan Supreme Court recognized that, even with the adoption of the AMABA, producers in the bargaining unit (regardless of how they exercise their concurrent federal and state statutory right to join or not join the association) may indeed deal separately and individually with processors so long as such dealings are not inconsistent with the terms of the contract negotiated between the association and the processor (A6).

Appellants' final argument is that it is impossible to simultaneously comply with both the AMABA and the FAFPA, and that compliance with the former would trigger federal enforcement of the latter. Appellants have failed to cite any case in which a court held that compliance with AMABA, or action permissible thereunder, triggered federal enforcement of FAFPA. In contrast, the state trial court observed that "Witness Torgerson, a USDA official, indicated that compliance with AMABA would not 'trigger' federal enforcement of AFPA" (A74). Likewise, the Michigan Supreme Court found that nothing in either of the two federal district court cases cited by Appellants "can be fairly read to suggest that the *state* requirement of exclusive association representation of all unit members makes it physically impossible to comply with both acts" (A17). In both the unreported *Garrison* v *Dairymen* case and in *Butz* v *Lawson Milk Co.*, 386 F. Supp. 227 (N.D. Ohio 1974), the Courts' decisions were directed toward pre-

venting a *processor's* coercion of a farmer's right to join, or refrain from joining, a cooperative association. In *Butz* the Court noted that:

> "The overriding purpose of Congress in enacting the Agricultural Fair Practices Act of 1967 was to protect the individual producer of milk in his right to band together with other producers or, in effect, to unionize." 386 F. Supp. at 235.

To argue, in the face of that judicial statement of FAFPA's purpose, that a state cannot provide an association with tools typically available to unions without automatically violating FAFPA, is to ignore the ample legislative history discussed by the Michigan Supreme Court. The U.S. Court of Appeals for the Second Circuit recognized the consistent congressional policy to help farmers strengthen their ability to negotiate with processors in *Fairdale Farms* v *Yankee Milk, Inc.*, 635 F.2d 1037, 1042 (2d Cir., 1980), wherein that Court noted that:

> "As late as 1968, with the enactment of the Agricultural Fair Practices Act [citations omitted], Congress continued to recognize the need for stronger and more effective bargaining and marketing associations for farmers."

Also see, *National Broiler Marketing Assoc.* v *United States*, 436 U.S. 816, 837 (1978) (Concurrence of Brennan, J.).

While Appellants are inaccurate in their statement that the Michigan Supreme Court characterized Section 2304 of FAFPA as "meaningless surplusage", that Court was correctly unwilling to conclude that such section undercut the primary purpose of the Act. In support of its reading of FAFPA, which does not prevent collective bargaining by farmers but rather encourages same, the

Michigan Supreme Court expressly relied (A11) on the Report of the Secretary of Agriculture to the Senate Committee on Agriculture and Forestry in recommending passage of FAFPA, which stated in pertinent part:

> "It is essential to protect the rights of producers to join together in cooperatives to perform necessary marketing operations, including bargaining with processors and other buyers over the terms of sale of the producers' farm products. Cooperative bargaining has come into prominence as the old market system is being displaced by contractual arrangements in the production and marketing of agricultural products. We believe these trends will continue.
>
> The proposed bill would materially strengthen farmers' ability to bargain and market effectively. It will reaffirm the right of producers to join together and operate cooperatives without interference. It will remove some of the impediments confronting producers in organizing and operating their cooperative associations." 1968 U.S. Code Cong. & Ad. News, p. 1875.

For the foregoing reasons it is clear that the AMABA is not preempted by the FAFPA.

CONCLUSION

WHEREFORE, Appellee MACMA respectfully submits that the question upon which this cause depends is so unsubstantial as not to require further argument, and Appellee respectfully moves the Court to dismiss this appeal.

Respectfully submitted,

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No. 82-1577

In the Supreme Court of the United States

October Term, 1982

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC. and FERRIS PIERSON,
Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS

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BRIEF IN OPPOSITION TO MOTIONS TO DISMISS

THE QUESTION PRESENTED IS SUBSTANTIAL

I. THE ISSUE PRESENTED BY THIS APPEAL IS SUBSTANTIAL AND MERITS PLENARY CONSIDERATION BY THE COURT.

Appellees' motions are addressed solely to the substantiality of this case on its merits.[1] Appellees do not claim

1. The Opinion below has now been reported at 416 Mich. 706 (1982). The parties to this appeal have not changed since the filing of the Jurisdictional Statement. The list of parties set forth at pages (i) and A112 through A114 of the Jurisdictional Statement is incorporated herein by reference.

that this appeal falls outside the Court's mandatory appellate jurisdiction. Nor do they contend that the controlling federal question was not properly raised and preserved throughout state court proceedings. To the contrary, appellees join in appellants' statement of the grounds for jurisdiction.

In their attempt to belittle the merits of this appeal, appellees merely highlight the practical importance of the question presented and the substantiality of appellants' position. Appellees' own motions make these points manifest: This case involves the regulation of agriculture, an industry vital to the nation's economy and well-being. It concerns the compulsory "agency shop" unionization of farmers, traditionally the most independent of businesses. (MACMA Motion, p. 5). And it involves a state court decision that a federal act, designed by its drafters to protect a farmer's right to join or not to join a cooperative association, really does not mean what it says.

Although this case arose in the context of asparagus farming in Michigan, far more is at stake. The Michigan Act affects all aspects of Michigan agriculture, and the opinion below will serve as precedent for the upholding of similar legislation passed or pending in other major agricultural states. (See Jurisdictional Statement, p. 26).

This appeal therefore presents a question of practical significance to the nation as a whole. That question was accorded narrow and inadequate treatment by the state court, which severely limited the effect of the Federal Act in order to uphold the conflicting provisions of its own law. The redress of that error requires this Court's plenary consideration.

II. TO AVOID PREEMPTION OF THE MICHIGAN ACT, APPELLEES ARGUE FOR AN UNREASONABLE AND NARROW CONSTRUCTION OF THE FEDERAL ACT.

As the Jurisdictional Statement makes clear, Congress had three distinct goals in passing the Federal Act. Congress sought to foster the formation of agricultural cooperatives. It also sought to preserve a non-consenting farmer's right to remain independent of cooperatives, and processors' rights to deal freely with the customers of their choice. Put another way, Congress sought to strengthen cooperatives, but limited their ability to force either non-consenting farmers or processors to deal with them. The Jurisdictional Statement cited persuasive legislative history establishing Congress' intent to preserve a free market system. *See, e.g.*, S. Rep. No. 474, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867.

Appellees ignore the legislative history cited in the Jurisdictional Statement. Instead, they defend the Michigan Act's abrogation of farmers' and processors' freedom to deal by narrowly defining the rights preserved by the Federal Act. According to MACMA, the Federal Act preserves only a farmer's right not to formally join a cooperative. (Motion, p. 4). So long as a non-consenting farmer's associational right is not infringed, says MACMA, the cooperative may dictate its price, terms of trade, quality standards and other conditions of sale to the farmer.

In order to uphold MACMA's position, this Court must accept the improbable conclusion that Congress was concerned only with a farmer's *associational* right not to become a formal cooperative member, and did not intend to protect the *economic* right to deal free of the cooperative. The legislative history, cited at pages 14 and 15 of the Jurisdictional Statement, belies this conclusion, as

does the entire logic of the Federal Act. Congress was not concerned with the hollow associational right not to be a formal cooperative member, but with the economic right to trade in a free market.

Appellees offer equally cold comfort to processors, who are prohibited by Section 4(1)(h) of the Michigan Act from negotiating with an individual farmer after the accreditation of an association encompassing that farmer. Mich. Comp. Laws § 290.704(1)(h). In response to the charge that the Michigan Act thereby destroys a processor's right, preserved by Section 2304 of the Federal Act, to deal with a farmer regardless of the farmer's membership in an association, appellees respond that the processor may still *deal* with individual Michigan farmers, so long as they abide by the terms dictated by the association. (MACMA Motion, p. 7; Board Motion, p. 6).

Again, in order to avoid the otherwise inescapable conflict between the state and federal acts, this Court is asked to presume a most narrow and improbable Congressional intent. Appellees would have the Court believe that Congress was concerned with social relationships between farmers and processors, and wished to promote personal contacts. Congress was apparently unconcerned with the economic realities of the business transactions between farmers and processors, the terms of which may be dictated by the cooperative. The Federal Act, as appellees view it, protects only the cherished American right to deal face-to-face.

Like the Michigan Supreme Court, appellees are forced to severely narrow the Federal Act in order to uphold the validity of the Michigan Act. Their attempt finds no support in the authorities they cite. The statement of Congressional policy in Section 2301 of the Federal Act, quoted in both motions, clearly evinces Congress' intent to protect the right to "join together *voluntarily*."

(Emphasis added). It does not support the Michigan Act's involuntary appointment of a cooperative as a non-consenting farmer's "exclusive bargaining agent." Mich. Comp. Laws § 290.713.

Similarly, the report of the Secretary of Agriculture, quoted at length on page 9 of the Board's Motion, does not state or imply that the Federal Act sought only to preserve the right to join cooperatives, to the exclusion of the concomitant right to deal free of associations. Finally, *Fairdale Farms v. Yankee Milk, Inc.*, 635 F.2d 1037 (2d Cir. 1980), an antitrust case cited by MACMA, only underscores appellants' point—the antitrust laws, as well as the Federal Act, prohibit coerced membership by cooperatives. 635 F.2d at 1044.

III. THE MICHIGAN ACT DESTROYS RIGHTS PRESERVED BY THE FEDERAL ACT, EVEN AS NARROWLY CONSTRUED BY APPELLEES.

In order to ascribe some meaning to the provision of Section 2303(a) of the Federal Act creating the "right to . . . refrain from joining" an association, appellees argue that the Act was intended "simply to protect farmers from handler coercion." (Board Motion, p. 8). Even this severe narrowing of the Federal Act's intent does not prevent a conflict between the two acts.

Appellees, like the Michigan Supreme Court, ignore the fact that cooperatives, as well as processors, are "handlers" under the Federal Act. (See Jurisdictional Statement, pages 14-15). If the Federal Act is designed "simply to protect farmers from handler coercion", as appellees contend, then it protects farmers from coercion by associations themselves. The relationship between associations and non-consenting farmers is, therefore, not federally "unregulated".

The Michigan Act authorizes more than the formation and preservation of cooperatives. It allows the cooperative, once accredited, to force non-consenting farmers to market their products in accordance with the terms dictated by the cooperative. Unlike the Federal Act, the Michigan Act does not prohibit cooperatives from coercing farmers in the exercise of their right to refrain from joining a cooperative. Mich. Comp. Laws § 290.704(2). The very essence of the Michigan Act is the coercion of non-consenting farmers for the good of the cooperative.

The Michigan Act clearly authorizes cooperatives to transcend the limits established by the Federal Act, even if the Federal law is viewed merely as a prohibition against "handler" coercion. The Michigan Act's destruction of the federally-created freedom from cooperative coercion requires a finding of preemption.

IV. THE CONGRESSIONAL STATEMENT THAT EXISTING STATE LAWS WERE NOT AFFECTED BY THE FEDERAL ACT IS IRRELEVANT TO THIS INQUIRY.

The Jurisdictional Statement pointed out that Congress did not intend to completely occupy the field of agricultural marketing. Section 2305(d) of the Federal Act specifically provides that "existing state law" shall not be changed or modified by the Federal Act. Appellees read this provision as a *carte blanche* sanctioning of state regulation in the area. (Board Motion, p. 4). Section 2305(d) will not bear such a construction.

The Congressional accommodation of existing stat laws is easily understandable in light of the state laws that did exist at the time the Federal Act was considered and passed. In considering the various forms of the Federal Fair Practices Bill, the Senate committee examined three

existing state agricultural bargaining laws. These were the laws of California (effective 1961), Oregon (effective 1963), and Ohio (effective 1965). Cal. Food & Agric. Code § 1223 *et seq.* (repealed); Or. Rev. Stat. § 646.515 *et seq.*; Ohio Rev. Code § 1729.18 *et seq.* The California Act, the "grandfather" of them all, was simple and straightforward. It provided that any farmer had the right to voluntarily join a cooperative bargaining association and prohibited handler interference with that right. Cal. Food & Agric. Code § 1224. The California Act did not make a cooperative association the exclusive representative of all farmers in the bargaining unit, nor did it prohibit a handler from dealing on an individual basis with an individual farmer. The Ohio and Oregon Acts were essentially identical to the California Act.

The evident Congressional purpose for allowing some state regulation in this area was to aid the federal government by providing enforcement and administrative procedures. The California, Ohio and Oregon Acts all provide for criminal penalties, and administrative review of violations of the Acts. These acts do not in any way conflict with the Federal Act, nor are they inconsistent with its objectives and purposes. They do not alter the balance drawn by Congress, but merely provide for general rules concerning the implementation of fair play standards.

The Michigan Act is an altogether different beast. It was passed in 1972, and so was not "existing" at the time the Federal Act was passed. The Michigan Act is markedly different from the state acts existing in 1967 and is is completely inconsistent with the Federal Act itself. It destroys federally protected rights and substitutes mandatory collective bargaining for the free market system carefully preserved by Congress. Section 2305(d) of the Federal Act does not confer any authority upon the states to so overrule federal law.

CONCLUSION

In order to uphold the validity of the Michigan Act, the Michigan Supreme Court narrowly interpreted the provisions and intent of the Federal Act. The court candidly conceded that if its interpretation of the Federal Act is incorrect, the Michigan Act conflicts with federal law and is invalid. (Opinion, p. A8). It should now be clear that the state court was incorrect in its reading of the Federal Act, and that its judgment should be summarily reversed.

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In the Supreme Court of the United States

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MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., ET AL., APPELLANTS

v.

AGRICULTURAL MARKETING AND BARGAINING BOARD, ET AL.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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QUESTION PRESENTED

Whether certain provisions of Michigan's Agricultural Marketing and Bargaining Act are preempted by the federal Agricultural Fair Practices Act of 1967.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

This case is a challenge to certain provisions of Michigan's Agricultural Marketing and Bargaining Act (Mich. Comp. Laws § 290.701 *et seq.* (Mich. Stat. Ann. § 12.94(101) *et seq.* (Callaghan rev. 1981)), which are alleged to conflict with the federal Agricultural Fair Practices Act of 1967 (7 U.S.C. 2301 *et seq.*). The Michigan Supreme Court found that the state law was not preempted by the federal Act.

1. The federal Agricultural Fair Practices Act of 1967, 7 U.S.C. 2301 *et seq.* ("AFPA"), guarantees farmers and

other producers of agricultural commodities ("producers")[1] the freedom to join cooperative associations without fear of reprisal from those who acquire agricultural products ("handlers").[2] 7 U.S.C. 2303 makes it unlawful for any handler to engage in practices that interfere with a producer's freedom to associate. Section 2303(a) prohibits any handler to "coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers * * *." Section 2303(b) forbids handlers to discriminate against producers concerning price, quantity, quality, or terms of purchase, because of membership in an association. Section 2303(c) forbids handlers to coerce producers into, or out of, a membership agreement or contract with an association. Section 2303(d) prohibits handlers to offer money or other inducements to keep producers from joining an association. Handlers are also forbidden to make false reports about the finances, management, or activities of associations (7 U.S.C. 2303(e)).

Although the Act forbids handlers to interfere with a producer's choice to join (or not to join) an association, it does not prevent handlers and producers from dealing or

---

[1] 7 U.S.C. 2302(b) provides:

> The term "producer" means a person engaged in the production of agricultural products as a farmer, planter, rancher, dairyman, fruit, vegetable, or nut grower.

[2] 7 U.S.C. 2302(a) provides:

> The term "handler" means any person engaged in the business or practice of (1) acquiring agricultural products from producers or associations of producers for processing or sale; or (2) grading, packaging, handling, storing, or processing agricultural products received from producers or associations of producers; or (3) contracting or negotiating contracts or other arrangements, written or oral, with or on behalf of producers or associations of producers with respect to the production or marketing of any agricultural product; or (4) acting as an agent or broker for a handler in the performance of any function or act specified in clause (1), (2), or (3) of this paragraph.

refusing to deal with one another for other reasons. 7 U.S.C. 2304 states that "[n]othing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association of producers." The Act does not attempt to occupy the entire field of regulation. Its provisions "shall not be construed to change or modify existing State law nor to deprive the proper State courts of jurisdiction" (7 U.S.C. 2305(d)).

2. The Michigan Agricultural Marketing and Bargaining Act, Mich. Comp. Laws § 290.701 *et seq.*, enacted in 1972, makes illegal the same handler conduct forbidden by the AFPA. Mich. Comp. Laws § 290.704(1). But the Michigan Act goes beyond the federal Act by regulating producers as well as handlers. It creates an agricultural marketing and bargaining board, within the Michigan department of agriculture, that accredits producer associations and mediates disputes. *Id.* §§ 290.703, 290.707, 290.715. It forbids associations to discriminate against producers; to refuse to bargain with handlers with whom the association or its members have had substantial prior dealing; to coerce or intimidate handlers in certain respects; and to make unsubstantiated reports about the finances, management, or activities of other associations or handlers. *Id.* § 290.704(2).

To be accredited, an association must have marketing and bargaining contracts (for the relevant period) with more than 50% of the producers in the bargaining unit. These contracts must also include more than 50% of the commodity produced in the bargaining unit. Mich. Comp. Laws § 290.707(c). Once accredited, the association acts as the exclusive bargaining agent for all producers in the bargaining unit, and producers must pay a service fee to the association. A producer must pay the fee, and abide by the terms of the contracts negotiated with handlers, even if he is not a member of the association. *Id.* §§ 290.710(1), 290.713(1).

3. The Michigan Agricultural Cooperative Marketing Association, Inc. ("MACMA") is an association accredited under the Michigan Act. It is the sole sales and bargaining representative for certain Michigan producers of asparagus. In 1974, MACMA negotiated contracts with handlers. Shortly thereafter appellants (representatives of handlers and producers) sued in the Ingham County Circuit Court for a declaration that the portions of the Michigan Act requiring service fees, and mandatory producer adherence to the association contracts, were preempted by the federal Act. The Circuit Court ruled that the case could be brought only in the Michigan Court of Appeals, and dismissed (J.S. App. A33-A37). The Michigan Court of Appeals also dismissed for want of jurisdiction (*id.* at A38-A39), and an appeal was taken to the Michigan Supreme Court. The Michigan Supreme Court remanded the matter to the Circuit Court, which it found was empowered to hear the case (*id.* at A44-A59). After a non-jury trial the Circuit Court ruled that the state statute was not preempted (*id.* at A60-A76).

4. The Michigan Supreme Court affirmed (J.S. App. A1-A32). Appellants argued that the federal Act gave handlers a right to deal with producers of their choice, and producers a right to deal with handlers of their choice. They urged that the Michigan Act, by requiring all producers in a bargaining unit to pay a service fee and adhere to the terms of the contract negotiated by the association, violated these rights.

The Michigan Supreme Court rejected that claim. It found the federal Act limited to preventing certain kinds of *handler* misconduct. The court thus viewed Michigan's regulation of *producers* as a step into an area that the federal government had not attempted to regulate (J.S. App. A14):

> In our view, the provisions of AMABA affording exclusive representation to a producers' cooperative

created by the majority of producers of a particular commodity, and the requirement of service fees, was a step by the Michigan Legislature into a previously unregulated area; a step which furthers both the goals of FAFPA and others not prevented by FAFPA by taking an active role in enhancing the bargaining position of producers, protecting not only individuals, but also their associations from internal and external pressures.

The court also rejected appellants' argument that compliance with the two statutes was physically impossible (J.S. App. A16-A17).

ARGUMENT

1. This Court has held that federal regulation should not be deemed to preempt state regulatory power except for persuasive reasons. If there is no explicit preemptive language, the federal action must touch a field where federal regulation is dominant, or there must be an actual conflict with federal law. *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, No. 81-750 (June 28, 1982), slip op. 9-10. Here there is no explicit preemptive language. The federal Act states that it "shall not be construed to change or modify existing State law" (7 U.S.C. 2305(d)). Nor, as appellants admit, is the federal interest so dominant that the field of regulation has been entirely occupied (J.S. 8). This Court has recognized that "the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 144 (1963).

The question, therefore, is whether the state and federal Acts are in conflict—that is, whether compliance with both is "a physical impossibility" (373 U.S. at 142-143), or whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, *supra*, slip op. 12-16. This in turn depends upon "Congress' intent in enacting the federal statute at issue." *Shaw* v. *Delta Air Lines, Inc.*, No. 81-1578 (June 24, 1983), slip op. 9.

2.a. We believe that insofar as the Michigan Act requires all producers in a bargaining unit to pay a service fee and adhere to the terms of the contract negotiated by the association, it frustrates the "purposes and objectives" of the AFPA. That conclusion is not compelled by the principal thrust of the federal Act, which in general is designed to prevent handlers from interfering with the formation of cooperative associations by exerting pressure on individual farmers. Nor does the federal Act attempt to address in a comprehensive way — as the Michigan Act does — the collective bargaining rights of producers and handlers. See 114 Cong. Rec. 7453-7454 (1968) (remarks of Rep. Poage); *id.* at 7456 (remarks of Rep. May).[3] Nevertheless, both the explicit terms of the federal Act and its legislative history indicate that Congress intended to protect individual producers against any sort of compulsion to join (or to be effectively controlled by) cooperative associations. The Michigan Act stands as an obstacle to that purpose.

---

[3]Moreover, this Court has recognized that the states retain authority to regulate directly the marketing of agricultural products — including such matters as the price at which commodities are sold. *Parker* v. *Brown*, 317 U.S. 341 (1943). And it might be argued that direct state control of agricultural marketing interferes no less with the freedom of individual producers than the exercise of similar power by cooperative associations. But as this Court has noted in other contexts, there may be differences between direct state control of such matters as prices, and delegation of the same control to private parties. Compare *Parker* v. *Brown*, *supra*, with *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Cf. *Larkin* v. *Grendel's Den, Inc.*, No. 81-878 (Dec. 13, 1982), slip op. 6.

7 U.S.C. 2303 provides that (emphasis added):

> It shall be unlawful for any handler knowingly to * * * engage in the following practices:
>
> (a) *To coerce any producer in the exercise of his right* to join and belong to or *to refrain from joining* or belonging to *an association* of producers * * *.

The term "handler" is defined in 7 U.S.C. 2302 (emphasis added):

> (a) The term "handler" means *any person* engaged in the business or practice of * * * (3) contracting or *negotiating contracts or other arrangements* * * * *on behalf of producers* * * * *with respect to* the production or *marketing* of any agricultural product * * *.

And "[t]he term 'person' includes * * * associations." 7 U.S.C. 2302(d). In short, the federal Act forbids an association of producers — which "negotiat[es] * * * on behalf of producers" — "[t]o coerce any producer in the exercise of his right to * * * refrain from joining * * * an association of producers * * *." See *Butz* v. *Lawson Milk Co.*, 386 F.Supp. 227, 235 (N.D. Ohio 1974) (an association of producers is a "handler" within the meaning of the AFPA); *Marketing Assistance Plan, Inc.* v. *Associated Milk Producers, Inc.*, 338 F.Supp. 1019, 1024 (S.D. Tex. 1972) (same).

This conclusion was clearer in the original language of the Senate bill, S. 109, 90th Cong., 1st Sess. (1967). It stated (113 Cong. Rec. 21410 (1967) (emphasis added)):

> SEC. 4. *It shall be unlawful for any* handler or *association of producers* knowingly to engage * * * in the following practices:
>
> (a) *To coerce any producer in the exercise of his right* to join and belong to or *to refrain from joining* or belonging to *an association* of producers * * *.

The Senate Report concerning that section stated:

> The objective of the bill is to protect the producer in the exercise of a free choice. Many witnesses suggested that the bill did not fully accomplish this purpose, because it protected the producer only from improper pressure not to join an association. To protect his free choice he should also be protected from improper pressure in the other direction, that is, improper pressure to join an association. The committee * * * was convinced by the logic of the situation that if the objective is to protect the producer and afford him a free choice, the bill should protect him from pressure in either direction.

S. Rep. No. 474, 90th Cong., 1st Sess. 5 (1967). The Report went on to note (*id.* at 6) that although "section 4(a) prohibits coercion on the part of both the handler and the association of producers[,]" subsection 4(d), which deals with inducements or rewards (cf. 7 U.S.C. 2303(d)), should only apply to the former. "[T]he association of producers should not be prohibited from offering inducements to producers to belong to an association, since it is quite proper for the association to pursue vigorously the *voluntary* organization of farmers in its attempt to secure a better bargaining position for farmers." S. Rep. No. 474, *supra*, at 6 (emphasis added).[4] The Report also observed, in regard to Section 4(c) (7 U.S.C. 2303(c)), that the individual producer "should be free from improper pressure to interfere with his arrangements and dealings with handlers; and the committee substitute would provide him with this protection" (S. Rep. No. 474, *supra*, at 6).

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[4] 7 U.S.C. 2303(d), like the original Senate version, still only applies to prohibit handlers from offering "any * * * inducement or reward to a producer for *refusing to or ceasing to belong* to an association of producers" (emphasis added).

S. 109 was passed by the Senate in the form reported out by the Committee on Agriculture and Forestry (113 Cong. Rec. 21411 (1967)). Senator Aiken, the bill's sponsor, briefly summarized it by saying (*ibid.*): "This bill * * * is designed to protect the agricultural producer's right to decide, free from improper pressures, whether or not he wishes to belong to a marketing or bargaining association."

The bill was referred to the House Committee on Agriculture (113 Cong. Rec. 21582 (1967)), which rejected a proposal "to delete the application of any prohibited practices * * * to associations of producers * * *." H.R. Rep. No. 824, 90th Cong., 1st Sess. 4 (1967). At the suggestion of the Committee on Rules, however, the House deleted the phrase "or association of producers" from Section 4 of the bill. See 114 Cong. Rec. 7449 (1968). Representative Sisk, on behalf of the Rules Committee, explained the change (*id.* at 7464):

> Since the bill already makes clear that associations of producers are not excluded from the term "handler," this phrase is redundant and could be misconstrued as unfairly pointing the finger of accusation to associations of producers. This is not the intent; and while my amendments do not change the purpose or basic meaning of the bill, they make misinterpretation more difficult.

Representative Poage, chairman of the House Committee on Agriculture, expressed a similar understanding of what the bill would do (*id.* at 7451, 7452):

> [W]e wanted to make this bill apply in both directions — to make of it a two-way street — to make of it a protector of the right of the producer to determine for himself whether he cared to or did not care to become a member of a cooperative.

> We * * * would actually assure to any producer the right to belong or not to belong to a cooperative.
>
> * * * * *
>
> The only thing which the co-ops cannot do is to go out and coerce a nonmember into becoming a member of the co-op and thereby come under the legislation. That is the only thing which this bill does not permit.

See also *id.* at 7450 (remarks of Rep. Latta) ("the farmers of this Nation will still have the right * * * to say to an association, 'I do not want to join your association and you cannot force me into it'"). Among the reasons for preserving the producer's right not to join an association, according to Representative Latta, was that "[t]he fees being charged by these associations are no small matter to the farmer. * * * Some of these associations are assessing members 1 percent of [their] gross. That is $250 out of that farmer's pocket to belong to the association" (*ibid.*).

b. The Michigan Supreme Court believed that "[w]hile § 2303 makes it unlawful for a handler to coerce a producer to 'join or belong to' an association, it does not forbid a *state* from requiring exclusive representation of individual producers where a producer majority sees fit" (J.S. App. A10; emphasis in original). But all that the Michigan Act does is to empower an association of producers—once it has attained the requisite size—to do what the federal Act forbids. A state may no more do this than it may empower other "handlers" to violate the terms of the federal Act.

Nor do we think it meaningful that the Michigan Act, while requiring exclusive representation and payment of dues, does not insist that producers actually become members of an accredited association. See J.S. App. A10 n.13. Whether or not a producer in the bargaining unit joins the association, he is bound, when dealing separately and individually with a handler, by the terms and conditions of

the contract negotiated by the association with handlers (*id.* A6). As the Senate Report noted, however, the federal Act intended to leave an individual producer "free from improper pressure to interfere with his arrangements and dealings with handlers" (S. Rep. No. 474, *supra*, at 6). And as Representative Latta stated in the course of the House debate, one of the reasons for protecting producers' freedom to refrain from joining an association was to avoid imposing on the unwilling the obligation of paying fees that could amount to "1 percent of [a producer's] gross" (114 Cong. Rec. 7450 (1968)). With respect to the aims of the federal Act, the requirements imposed by the State of Michigan are the "practical equivalent" of a requirement of formal membership. Cf. *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 743 (1963); *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 217 n.10 (1977).

3. Appellants also argue that Congress in the federal Act intended "to protect a processor's right to deal individually with farmers" (J.S. 18), and that the Michigan Act conflicts with that right as well. It is true that Mich. Comp. Laws § 290.713(1) makes "[a]n accredited association * * * the exclusive representative of all producers in the bargaining unit for the purpose of bargaining with all handlers that purchase the agricultural commodity produced in the bargaining unit." And, as noted above, even producers who have not joined the association are bound "by all terms and conditions of the contract negotiated with handlers" (J.S. App. A6). Appellants contend that that requirement runs afoul of 7 U.S.C. 2304, which states:

> *Disclaimer of intention to prohibit normal dealing*
>
> Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in

or contract with an association of producers, nor require a handler to deal with an association of producers.

The Michigan Supreme Court, by contrast, found that Section 2304 was nothing more than its caption suggests: a "[d]isclaimer of intention to prohibit normal dealing" (J.S. App. A7). "There is no logical nexus," the court said, "between a provision declaring 'this is what we did not do' and the conclusion that 'what we did not do, cannot therefore be done' " (*id.* at A8). It found this interpretation to be supported both by the prohibited practices section of the Act (7 U.S.C. 2303) and by the legislative history (J.S. App. A9-A14).

We doubt that the AFPA was intended, as appellants have argued (J.S. App. A7), to strike "a careful balance" among "the conflicting interests of individual producers, processors, and associations[,]" and to create or protect "a *processor's* right to deal with the individual farmer of his choice." If handlers can insist on dealing directly even with producers who have voluntarily appointed an association as their designated agent, the protections of the AFPA would not be meaningful. We note that Section 2304, while generally disclaiming any intent to interfere with a handler's choice of suppliers, makes clear that a handler may *not* reject a producer simply because he has joined an association.[5] Moreover, the only portion of the federal Act clearly

---

[5]The section goes on to say that nothing in the Act "require[s] a handler to deal with an association of producers." Contrast Mich. Comp. Laws § 290.704(1)(g). That is, of course, true. Section 2303 addresses only handlers' dealings with "producers," a term that does not include associations. See 7 U.S.C. 2302(b). The obligation, such as it is, to deal with an association appointed by a producer as his agent arises from the voluntary act of the producer, coupled with the prohibition of discrimination against a producer "because of his membership in or contract with an association" (7 U.S.C. 2303(b)).

creating duties — and corresponding rights — is 7 U.S.C. 2303, which does nothing more than prohibit certain handler practices. See also 114 Cong. Rec. 7464 (1968) (remarks of Rep. Sisk) ("Certainly we want to avoid the interpretation that the legislation intends to encourage the circumvention of properly constituted marketing or bargaining associations.").[6]

In any event, this issue does not seem to present an independent ground for reversal of the Michigan Supreme Court's judgment. If nonmember producers may (consistent with the AFPA) be bound by the terms of contracts negotiated by an association, it is highly unlikely that the federal Act intended to grant handlers the right to insist that such terms be ignored. If, on the other hand, the AFPA permits any willing producer to remain aloof from an association and negotiate individually, the handlers' right invoked by appellants does not, as a practical matter, enlarge the class of suppliers with whom handlers may deal.

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[6]It may be that a different question is presented in cases where a handler has a preexisting contract with a producer, and the contract contemplates direct dealings between the handler and the producer. See *Butz* v. *Lawson Milk Co., supra,* 386 F.Supp. at 238-240. The AFPA need not be understood to require a handler in such a case to deal under the contract with an association that the producer has unilaterally appointed as his agent.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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No. 82-1577

In the Supreme Court of the United States

October Term, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC.; and FERRIS PIERSON,
Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF OF APPELLANTS ON THE MERITS

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QUESTION PRESENTED

Whether certain provisions of the Michigan Agricultural Marketing and Bargaining Act conflict with and are therefore preempted by the Federal Agricultural Fair Practices Act of 1967.

PARTIES TO PROCEEDINGS BELOW

The appellants in this Court were appellants in the Michigan Supreme Court and plaintiffs in the trial court. They are:

1. Michigan Canners and Freezers Association, Inc. (now known as Michigan Food Processors Association, Inc.), a Michigan non-profit corporation.

2. Forty-four individual and corporate members of the Michigan Canners and Freezers Association, Inc., who joined as plaintiffs at the time suit was initiated. Their names, too numerous to list in the caption, are set forth in the appendix to the Jurisdictional Statement at pages A112 through A114 and incorporated here by reference.

3. Dukesherer Farms, Inc., a Michigan corporation.

4. Ferris Pierson, an individual citizen of the State of Michigan.

The appellees in this Court were appellees in the Michigan Supreme Court and defendants in the trial court. They are:

1. The Agricultural Marketing and Bargaining Board, an administrative agency of the State of Michigan, represented below by the Michigan Attorney General.

2. Michigan Agricultural Cooperative Marketing Association, Inc., a Michigan corporation.

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No. 82-1577

In the Supreme Court of the United States

October Term, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC.; and FERRIS PIERSON,

Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF OF APPELLANTS ON THE MERITS

Appellants, plaintiffs below, appeal from a final judgment of the Supreme Court of Michigan, dated December 23, 1982, upholding the validity of the Michigan Agricultural Marketing and Bargaining Act.

OPINIONS BELOW

The final opinion of the Michigan Supreme Court (J.S. App. A1-A32)[1] is reported at 416 Mich. 706, 332 N.W.2d 134 (1982). That Court's decision in an earlier appeal (J.S. App. A44-A59), which dealt with jurisdictional issues

1. Citations to the appendix to the Jurisdictional Statement are made as follows: "J.S. App. A....."

of state law, is reported at 397 Mich. 337, 245 N.W.2d 1 (1976). The opinions of the trial court on jurisdiction (J.S. App. A35-A37) and on the merits (J.S. App. A60-A76) are not officially reported.

GROUNDS FOR JURISDICTION

Appellants initiated this case by the filing of a complaint in the Michigan Circuit Court seeking injunctive and declaratory relief against the enforcement of the Michigan Agricultural Marketing and Bargaining Act, a statute of the State of Michigan. Among other averments, the complaint alleged that the state statute was unconstitutional because it was preempted by the Federal Agricultural Fair Practices Act of 1967. The trial court and the Michigan Supreme Court upheld the validity of the act on all grounds, including the ground of federal preemption. The Michigan Supreme Court issued a final judgment (J.S. App. A79) and supporting opinion (J.S. App. A1-A32) on December 23, 1982. No party requested a rehearing.

Appellants filed their Notice of Appeal to this Court with the Michigan Supreme Court and Circuit Court on March 8, 1983. (J.S. App. A31). Appellants docketed this appeal on March 22, 1983, within ninety days of the final judgment below. This Court noted its probable jurisdiction on October 17, 1983.

The jurisdiction of this Court rests upon Title 28 of the United States Code, Section 1257(2). The issue of the repugnancy of the state statute to the Federal Agricultural Fair Practices Act of 1967 was properly raised at each level of state court proceedings and was expressly considered and decided by the Michigan Supreme Court. (Opinion, J.S. App. A4-A17). This Court therefore has appellate jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause, Article VI of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Federal Agricultural Fair Practices Act of 1967, Title 7, United States Code, Sections 2301-2306 (1973):

> [Set out in full in the appendix to the Jurisdictional Statement, pages A84 through A88.]

Michigan Agricultural Marketing and Bargaining Act, Act 344 of the Public Acts of 1972, Michigan Compiled Laws, Sections 290.701 - .726 (Supp. 1982):

> [Set out in full in the appendix to the Jurisdictional Statement, pages A89 through A111.]

STATEMENT OF THE CASE

A. Nature of the Case

This case involves the conflicting provisions and goals of federal and state statutes regulating agricultural bargaining. Congress passed the Agricultural Fair Practices Act of 1967 (the "Federal Act") on April 16, 1968. The Federal Act seeks to accommodate the potentially conflicting interests of individual farmers, cooperatives of farmers, and purchasers of farm products. It balances those interests by protecting the right of farmers to form cooperative associations, while safeguarding the right of individual farmers to remain independent and preserving the right of purchasers to deal with farmers of their choice.

Four years later, the Michigan legislature enacted the Michigan Agricultural Marketing and Bargaining Act (the "Michigan Act"). The Michigan Act differs radically from the Federal Act. Under the Michigan Act, the state accredits cooperatives if they represent a majority of farmers who produce a majority of a certain crop. Once the cooperative is accredited, each farmer growing that crop is bound by the cooperative's price, terms and conditions, whether or not the farmer consents to representation by the cooperative. Under Michigan's compulsory union system, nonconsenting farmers may not negotiate different terms and conditions on their own behalf, and purchasers are required to bargain with the cooperative.

Because the Michigan Act stands as a clear obstacle to the accomplishment of the Federal Act's goals and purposes, appellants began this action to declare the Michigan Act unconstitutional.

B. Challenged Provisions of the Michigan Act

Appellants challenge the following provisions of the Michigan Act as repugnant to the Federal Act:

Section 4(1)(g): prohibits, as an unfair practice, a processor's refusal to bargain with certain accredited associations.

Section 4(1)(h): prohibits, as an unfair practice, a processor's negotiation with a producer included in a bargaining unit after accreditation of an association.

Section 10(1), the third and fifth sentences: require the preliminary declaration of accreditation to state that the association is the exclusive sales agent for all producers in a bargaining unit and provide for the mandatory deduction of marketing service fees from the proceeds of all producers.

Section 10(2), the final sentence: provides that all producers in a bargaining unit are "deemed" to assent to accreditation of an association if a majority of producers representing over 50% of crop production assent to accreditation.

Section 13(1), the first and third sentences: provide that an accredited association is the exclusive representative of all producers in the bargaining unit and require processors to negotiate with accredited associations.

C. Parties

Appellants include representatives of both groups directly affected by the Michigan Act: farmers (defined as "producers" in both acts) and processors of fruits and vegetables (included within the definition of "handlers" in both acts). Michigan Canners and Freezers Association, Inc. is a non-profit corporation having as its members

processors of fruits and vegetables. The forty-four individual members of the association are asparagus processors who joined as parties plaintiff to this action. Dukesherer Farms, Inc. is a corporation engaged in asparagus farming. Ferris Pierson is also an asparagus farmer.

Appellee Agricultural Marketing and Bargaining Board (the "Board") is an administrative agency of the State of Michigan. The Board was established under section 3 of the Michigan Act to administer and enforce bargaining between producers and handlers of various agricultural commodities, including asparagus.

Appellee Michigan Agricultural Cooperative Marketing Association, Inc. ("MACMA") is a Michigan agricultural cooperative. As a cooperative association that bargains on behalf of producers, MACMA is a handler under the Federal Act, 7 U.S.C. § 2302(2)(3), but is not a handler under the Michigan Act, Mich. Comp. Laws § 290.702(a), (g).

D. Proceedings Below

In November of 1973, the Asparagus Growers Division of MACMA filed a petition with the Board seeking a determination of a bargaining unit for asparagus under the Michigan Act. In December of 1973, the Board approved a bargaining unit encompassing all Michigan farmers who produced a certain minimum quantity of asparagus during a defined marketing period. On January 25, 1974, the Board accredited MACMA as the sole sales and bargaining representative for all producers included in the Michigan asparagus bargaining unit. Acting pursuant to the Michigan Act, MACMA thereafter negotiated on behalf of the bargaining unit members, including appellants Dukesherer Farms and Pierson, regarding the 1974 asparagus crop. These actions were performed over the objection of all appellants.

On March 7, 1974, appellants filed a complaint in the Ingham County Circuit Court challenging the Michigan Act and the Board's actions in connection with the asparagus bargaining unit. The complaint raised a number of federal and state claims, including the claim that the Michigan Act was unconstitutional because it was preempted by the Federal Act.

On motion of defendants, the Circuit Court dismissed the complaint, holding that the state court of appeals had exclusive subject matter jurisdiction under state law. (Order and Opinion, J.S. App. A33-A37). Appellants thereafter unsuccessfully sought review in the Court of Appeals. (J.S. App. A38-A41). On January 15, 1975, the Michigan Supreme Court granted leave to appeal the dismissal and invited the parties to brief the substantive issues of constitutionality, which included the federal preemption issue. (Order, J.S. App. A42).

On March 18, 1975, appellants filed their brief on appeal in the Michigan Supreme Court, preserving the following question: "1. Is the Agricultural Marketing and Bargaining Act unconstitutional because it conflicts with Federal Agricultural Fair Practices Act of 1967, and is thereby preempted by such legislation?"[2] On review of the lower court dismissal, the Michigan Supreme Court reversed, holding that the Circuit Court did have subject matter jurisdiction to consider the constitutional challenges to the Michigan Act. (Opinion, J.S. App. A44-A55). The action was remanded for the development of a factual record, made necessary by appellant's police power claim. (*Id.* A46). The court did not then reach the merits of the preemption issue.

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2. Under Michigan practice, questions are preserved for appeal by their inclusion in the "Statement of Questions Involved" in an appellant's brief. Mich. Gen. Ct. R. 813.1.

The Circuit Court conducted a non-jury trial between September 6 and September 27, 1977. The trial court took extensive proofs, virtually all of which related to the police power issue. Appellants again briefed and argued the preemption issue raised in this appeal. In an opinion filed February 2, 1981, the Circuit Court upheld the constitutionality of the state act on all grounds. The trial court expressly considered the preemption issue, holding that the Federal Act did not preempt the Michigan Act. (Opinion, J.S. App. A60-A76).

The parties returned to the Michigan Supreme Court, pursuant to the court's reservation of appellate jurisdiction. Appellants' brief again raised the preemption issue in the "Statement of Questions Involved" and presented arguments and authorities in support of preemption. The Michigan Supreme Court considered and rejected appellants' contention, holding that the Federal Act did not create or preserve the right of individual producers or processors to bargain individually and so was not inconsistent with the Michigan Act. (Opinion, J.S. App. A4-A17, and Final Judgment, J.S. App. A79-A80). The court also held, on a prospective basis, that future accreditations under the Michigan Act must be conducted in accordance with the notice and hearing procedure of the state administrative procedures act. This state law ruling did not affect the validity of the Michigan Act or the accreditation of the asparagus bargaining unit. This appeal involves only the question of federal preemption.

SUMMARY OF ARGUMENT

The Michigan Agricultural Marketing and Bargaining Act is preempted by the Federal Agricultural Fair Practices Act, because it stands as an obstacle to the accomplishment of the full purposes of the Federal Act. Congress, after careful study, determined that the marketing of farm products should be regulated in such a way as to protect the right of farmers to form cooperatives, the right of individual farmers to remain independent of those cooperatives, and the right of handlers to deal with the farmers of their choice. Congress implemented these potentially conflicting policies by enacting the Agricultural Fair Practices Act. The Michigan legislature also wished to protect the right of farmers to form bargaining associations, but did not balance that right in any meaningful way with the right of farmers not to join such associations, or with the right of handlers to deal with individual farmers of their choice. The Michigan Act therefore differs radically from the Federal Act. Rejecting the free market system adopted in the Federal Act, the Michigan Act provides for a form of compulsory unionism in the farm area.

The Federal Act specifically protects the right of a farmer not to join a cooperative and protects that right from encroachment by cooperatives themselves. The Michigan Act destroys this right by requiring each farmer in a bargaining unit to become a *de facto* member of the association, regardless of the farmer's wishes. It cannot be seriously argued that a farmer who is bound by all of the terms and conditions of contracts negotiated by an association, including price, quality, quantity and service fees, has been protected in his right to refrain from belonging to an association. The farmer cannot sell his produce except on the terms and conditions dictated by an association that he does not wish to join.

The Federal Act preserves a handler's pre-existing right to refuse to deal with a cooperative and to deal on an individual basis with the farmers of his choice. In contrast, the Michigan Act forces handlers to deal only with cooperative associations. Once an accredited association is formed under Michigan law, a handler is prohibited from negotiating with any individual farmer included in the association's bargaining unit, even if the farmer has refused to join the association.

The Michigan Act, which imposes a mandatory union system upon the farm industry, frustrates federal rights and policies. Congress sought to provide for a free market system in the farming industry, with each element of that industry free to deal independently with the other. Michigan's system coerces non-consenting farmers and handlers for the benefit of cooperatives. Because the two approaches cannot be reconciled, the Michigan Act is necessarily preempted.

ARGUMENT

I. APPELLANTS' CLAIM OF PREEMPTION INVOLVES IMPORTANT ISSUES OF FEDERALISM AND TURNS UPON THE CONSTRUCTION OF AN ACT OF CONGRESS.

The Supremacy Clause of Article VI of the United States Constitution is the keystone of our federal system. Since the early days of our nation, this Court has held that the Supremacy Clause invalidates state laws that "interfere with or are contrary to, the laws of congress." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

The preemption doctrine invalidates state regulation in two distinct situations. Whenever Congress has occupied an entire field of regulation, the federal legislation preempts all state laws on the subject matter in question. In such a case, any state regulation of the subject matter is barred, even if the state statute is harmonious with the federal enactments. *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

This type of preemption is not present in this case. The Federal Act has apparently not completely "occupied the field". Section 2305(d) of the Federal Act provides that "existing state law" shall not be changed or modified by the Federal Act. The Federal Act thus leaves some latitude for regulation by the states.

The challenged sections of the Michigan Act are, however, voided under the second preemption standard. When Congress has not completely occupied a field of regulation, a state law is nevertheless preempted to the extent that it conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility or where state law

stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 153 (1982).

The Michigan Supreme Court was bound to apply these principles in deciding appellants' preemption claim. When faced with a potential conflict between federal and state laws, state courts typically resolve the conflict by giving their own law a "narrowing construction". The Michigan Supreme Court strayed from that course. It resolved the patent conflict between the Federal Act and the Michigan Act by giving its own law a broad interpretation while narrowly construing the Federal Act. The court found that the Federal Act had only one objective: to enhance producer bargaining power. It accordingly held that the Federal Act did not create or protect rights of private dealing (Opinion, J.S. App. A8); and that "Section 2304 [of the Federal Act] is nothing more than an explanation of what [the Act] was not intended to do." (*Id.*, A8). The court rejected the proposition that the Michigan Act frustrated Congress' objectives, because it found "no intent on the part of Congress, as plaintiffs assert, to affirmatively 'strike a balance' among competing interests." (*Id.*, A14).

The Michigan Supreme Court left no doubt that its finding of a lack of preemption rested upon a construction of the Federal Act: "Were we to agree that § 2304, or any provision in [the Federal Act], was meant to affirmatively *create* or *protect* rights of private dealing between individual producers and processors, we would agree that [the Michigan Act] must fall because, plainly [the Michigan Act], conflicts with that result. However, we do not find such meaning in the provisions of the federal act." (*Id.*, A8). The state court thereby com-

mitted itself to an indefensibly narrow interpretation of the Federal Act and the preemption doctrine.

The interpretations of the Michigan Supreme Court are demonstrably erroneous. Congress designed the Federal Act to accomplish three distinct goals. (Section II.A., below). One goal, the protection of independent farmers against compulsory cooperative membership, is totally destroyed by the Michigan Act. (Section II.B., below). The Michigan Act similarly frustrates the Federal Act's objective of preserving a competitive market system in which processors are free to deal with farmers of their choice. (Section II.C., below). The preemption doctrine requires nullification of a state law that so frustrates federal policy, regardless of the purpose of the state act. (Section III., below).

II. THE MICHIGAN ACT STANDS AS AN OBSTACLE TO THE ACCOMPLISHMENT OF THE FULL OBJECTIVES OF CONGRESS AS EXPRESSED IN THE FEDERAL FAIR PRACTICES ACT AND IS THEREFORE PREEMPTED.

A. The Regulatory Schemes Established By The Federal And State Acts Are Fundamentally Inconsistent.

The United States Congress and the Michigan legislature have each passed legislation to protect a farmer's right to join a cooperative association, and to bargain collectively through that association. Although the Michigan and Federal statutes share that common goal, they establish regulatory schemes that irreconcilably conflict.

Congress chose to protect a farmer's right to bargain through an association only insofar as that right does not conflict with the rights of purchasers of farm products

and the right of individual farmers to remain independent of cooperative associations. The Federal Act evidences three distinct objectives. First, the Act authorizes farmers to form voluntary cooperative associations and prohibits discrimination against farmers on the basis of membership in such associations. 7 U.S.C. §§ 2301, 2303. Second, it protects an individual farmer's right not to join a cooperative association and prohibits interference with that right by processors and cooperative associations. 7 U.S.C. §§ 2301, 2303. Finally, the Federal Act protects the right of purchasers of farm commodities to deal freely with the farmers of their choice. 7 U.S.C. § 2304.

The legislative history of the Federal Act shows that Congress deliberately pursued each of these objectives. As first introduced, the agricultural marketing bill had only one dimension. H.R. 11146, S. 2849, 88th Cong., 2d Sess. (1964). It was proposed as an amendment to the Capper-Volstead Act of 1922, 7 U.S.C. §§ 291-292, which had granted antitrust immunity to certain concerted action by agricultural cooperatives. The bill prohibited processors from interfering with a farmer's right to join an association. It prohibited processors from discriminating against association members and from coercing a farmer to breach or cancel agreements with associations. The original bill was not reported out of committee.

Senator Aiken reintroduced the bill in the 89th Congress, in essentially unchanged form. S. 109, 89th Cong., 1st Sess. (1965). During Senate hearings, many senators and witnesses expressed concern that the bill could be construed as substituting a collective bargaining system for the existing free market system. Specifically, witnesses called for protection of a farmer's right *not to join* an association and for recognition that processors should not be forced to deal with cooperatives. *See, e.g.*, Hear-

ings on S. 109 Before the Subcomm. of the Senate Comm. on Agriculture and Forestry, 89th Cong., 2d Sess. 41, 125-127 (1966).

As a result of the hearings in 1966, the sponsors proposed an amended version of the bill. S. 109, 90th Cong., 1st Sess. (1967), *reprinted in* Hearings on S. 109 Before the Subcomm. of the Senate Comm. on Agriculture and Forestry, 90th Cong., 1st Sess. 1-3 (1967) (hereinafter "May, 1967, Senate Hearings"). The 1967 bill was no longer a proposed amendment to the Capper-Volstead Act. The bill was now entitled the "Agricultural Producers Marketing Act". In response to requests for protection of individual farmers against cooperatives, section 3(2)(3) of the revised bill included cooperatives in the statutory definition of "handler". *See* May, 1967, Senate Hearings, *supra* at 8, 82. But the bill continued to protect only the "right to join and belong to an association of producers" and continued to prohibit coercion of a farmer to "breach, cancel or otherwise terminate" contracts with associations. S. 109, 90th Cong., 1st Sess. § 4. The bill contained no provision protecting the right not to join an association, nor did it recognize a processor's right to deal free of associations.

A Senate subcommittee conducted hearings in May of 1967, during which witnesses continued to complain that the bill was "one-sided". May, 1967, Senate Hearings, *supra* at 94. Witnesses again called for express protection for a farmer's right not to join an association and for the rights of processors. *See, e.g.*, *id.*, at 95, 110, 131, 133-35, 139-140, 142-148. Senators indicated agreement with these concepts. *See, e.g.*, *id.*, at 10-11, 13-17, 170.

The May, 1967, Senate Hearings produced a significantly revised bill. S. 109, 90th Cong., 1st Sess., 113 Cong.

Rec. 21,410 (1967). The bill's prohibited practices were expanded to proscribe, for the first time, interference with the right "to refrain from joining or belonging to an association." *Id.*, § 4(a). The bill also would prohibit the coercing of a farmer to enter into or maintain a contract with an association, as well as coercion to breach or terminate the contract. *Id.*, § 4(c). The revised bill contained a new section 5, which disclaimed any intent to prohibit proper dealings between processors and farmers or to compel dealings between processors and associations. Significantly, the bill's title was changed from the "Agricultural Producers Marketing Act" to the "Agricultural Fair Practices Act". The Senate Committee felt that the new title more accurately reflected the bill's purpose "to establish standards of fair practices required of handlers and associations of producers in their dealings in agricultural products." S. Rep. No. 474, 90th Cong., 1st Sess. (1967), *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1869 (hereinafter "S. Rep. 474").

The Senate passed S. 109 in its revised form. 113 Cong. Rec. 21,411 (1967). As passed by the Senate, the bill represented a much different approach to agricultural marketing from that of its predecessors. The bill's purpose was no longer merely to foster cooperatives; it was now designed "to protect the agricultural producer's right to decide, free from improper pressures, whether or not he wishes to belong to a marketing or bargaining association." 113 Cong. Rec. 21,411 (1967) (remarks of bill's sponsor, Senator Aiken). By revision of section 4 and inclusion of section 5, the bill was felt to be "fair to producers, associations of producers, handlers, and any others who may be affected by the bill." Senate Report 474, *supra*, *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1868.

The bill then proceeded to the House of Representatives and was referred to the Committee on Agriculture. 113 Cong. Rec. 21,582 (1967). The House left substantially untouched section 5, which safeguarded a processor's right to deal with farmers of his choice. The House changed the wording of the provision safeguarding a farmer's right not to join an association, but did not change the substance of that right. "We made of the original legislation a two-way proposal which would actually assure to any producer the right to belong or not to belong to a cooperative." 114 Cong. Rec. 7451 (1968) (remarks of Congressman Poage, Chairman of the House Committee on Agriculture). The Senate concurred in the House revisions; the Act passed on April 16, 1968.

The Federal Act's legislative history leaves no doubt about the Act's objectives. Four years of intense debate produced a substantially altered bill, which balanced the competing interests of all parties. In contrast to its predecessors, the enacted legislation created a competitive system in which associations, independent farmers, and processors would all be free from compulsion or coercion. Some of the original supporters of the bill complained that the Act's final version "tortured the original intent of S. 109" because the Act restricted both handlers and cooperatives and granted "additional authority to handlers of farm produce." H.R. Rep. No. 824, 90th Cong., 1st Sess. 8-9 (1967) (opposing views of Congressmen Foley, Teague and Zwach). Congress' ultimate goal was no longer only to foster agricultural cooperatives, but also to "strengthen the competitive marketing system for agricultural commodities." *Id.* at 1.

Four years later, the Michigan Legislature passed the Michigan Agricultural Marketing and Bargaining Act. The Michigan Act protects the rights of farmers who wish to

join cooperatives, but completely eliminates the rights of individual farmers and purchasers to deal directly with each other. Instead, the Michigan Act replaces the competitive market system established by the Federal Act with a union shop.

There is no question concerning the meaning or effect of the Michigan Act, since it has been authoritatively construed by the state supreme court. As interpreted by the state court, the act allows accreditation of a cooperative association representing a majority of producers who produce a majority of a certain crop, such as asparagus. Once accredited, that association becomes the exclusive bargaining agent for all Michigan asparagus growers in the defined unit. Mich. Comp. Laws §§ 290.710, 713. Those asparagus growers who do not wish to join the association are nevertheless bound by all of the terms and conditions of the association's contracts with asparagus purchasers, and must help support the association by paying a service fee. Mich. Comp. Laws § 290.710. The Michigan Act makes it unlawful for an asparagus purchaser to negotiate directly with an asparagus farmer who is included in such a bargaining unit, even if that farmer has chosen not to join the association. Mich. Comp. Laws § 290.704(1)(h). Additionally, a purchaser *must* bargain with an accredited association if it has had prior substantial dealings with the association or its members. Mich. Comp. Laws § 290.704 (1)(g). (*See* Opinion, J.S. App. A6-A7).

The provisions of the Michigan Act cited above irreconcilably conflict with the Federal Act. The Michigan Supreme Court openly admitted that the Michigan Act contains "compulsory" aspects central to the Act's operation. (*Id.* at A26). Those provisions eliminate a farmer's right to sell his crops independent of an association and force purchasers to bargain with associations. As shown below, the Michigan Legislature's substitution of a com-

pulsory union system for the free market system prescribed by Congress overrules the careful balance struck by Congress in the Federal Act.

B. The Federal Act Protects An Individual Farmer's Right Not To Join Or To Bargain Through A Cooperative, And The Michigan Act Destroys This Right.

1. *The Federal Act Protects Individual Farmers From Coercion By Cooperatives.*

The Federal Act expressly protects an individual farmer's freedom to join or refrain from joining a cooperative association. Section 2301 states the Congressional policy that farmers should be "free to join together *voluntarily* in cooperative organizations as authorized by law." (Emphasis added). Section 2303(a) gives producers the "*right* to join and belong or *to refrain from joining or belonging* to an association of producers" and protects that right from interference by "handlers". (Emphasis added). Section 2303(c) prohibits handlers from coercing or intimidating any producer to enter into or maintain (as well as to breach or cancel) a membership agreement or marketing contract with an association.

As recognized by the lower federal courts, the statutory definition of handler includes cooperative associations themselves. 7 U.S.C. § 2302(a)(3); *Butz v. Lawson Milk Co.*, 386 F. Supp. 227, 235 (N.D. Ohio 1974); *Marketing Assistance Plan, Inc. v. Associated Milk Producers, Inc.*, 338 F. Supp. 1019, 1024 (S.D. Tex. 1972). Congress thus consciously sought to protect the right of farmers to remain independent of cooperative associations and prohibited interference with that right by cooperatives themselves.

The Federal Act's legislative history demonstrates that Section 2303 means what it says. Both the Senate and

the House consciously intended to prohibit cooperatives from interfering with a farmer's right to deal free of an association. The version of the bill enacted by the Senate was unequivocal on this point. The Senate bill provided:

> SEC. 4. It shall be unlawful for any handler or association of producers knowingly to engage . . . in the following practices:
>
> (a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers. . . .

S. 109, 90th Cong., 1st Sess. § 4, 113 Cong. Rec. 21,410 (1967). This provision was the result of widespread sentiment, expressed by both Senators and witnesses alike, that the "freedom of choice of any farmer to join or not to join an organization of his choice is a basic American right, and it must be protected." May, 1967, Senate Hearings, *supra* page 15, at 10 (1967) (remarks of Senator Williams).

The Senate Report explaining the addition of this provision expresses a deliberate protection of the right not to join associations:

> The objective of the bill is to protect the producer in the exercise of a free choice. Many witnesses suggested that the bill did not fully accomplish this purpose, because it protected the producer only from improper pressure not to join an association. To protect his free choice he should also be protected from improper pressure in the other direction, that is, improper pressure to join an association. The committee did not have before it any testimony to indicate that producers were being subjected to any improper pressure to join associations, but was convinced by the logic

> of the situation that if the objective is to protect the producer and afford him a free choice, the bill should protect him from pressure in either direction.

S. Rep. 474, *supra* page 16, *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1871. The Report goes on to state that the individual producer "should be free from improper pressure to interfere with his arrangements and dealings with handlers; and the committee substitute would provide him with this protection." *Id.* at 1872.

The House of Representatives preserved the Senate bill's protection of the rights of individual farmers against cooperatives. The House Committee on Agriculture rejected a proposed amendment that would delete the application of the prohibited practices to associations of producers. H.R. Rep. No. 824, 90th Cong., 1st Sess. 4 (1967). "The Committee felt that in those limited instances where cooperative associations are covered, the application of the bill is both justified and in the interest of producers themselves." *Id.* at 4-5.

The House did change the language of section 4, the prohibited practices section, to delete specific reference to associations. This change did not modify the substance of the section, because associations were already included in the statutory definition of "handler". As explained by Representative Sisk, the author of the amendment,

> Since the bill already makes clear that associations of producers are not excluded from the term "handler", this phrase is redundant and could be misconstrued as unfairly pointing the finger of accusation to associations of producers. This is not the intent; and while my amendments do not change the purpose or basic meaning of the bill, they make misinterpretation more difficult.

114 Cong. Rec. at 7464 (1968).

In their debate surrounding approval of the Federal Act, its House sponsors left no doubt about their intention to "try to see that every producer has the right to sell his products to a cooperative, or to noncooperative handlers if he so sees fit." 114 Cong. Rec. at 7454 (1968) (remarks of Representative Poage). There is accordingly no room to argue that the Federal Act seeks only to protect the right to join cooperatives.

These and other statements in the Act's legislative history clearly show that Congress intended to protect the *economic* right to refrain from dealing through an association, and not simply the formal *associational* right not to become an official cooperative member. As Senator Jordan stated: "The law intends that . . . he should not be made to join unless he wants to join. He ought to be able to sell anywhere he wants to sell." May, 1967, Senate Hearings, *supra* page 15, at 170. The comments of the members of the House of Representatives consistently support this interpretation. As Chairman Poage explained to the House: "We made of the original legislation a two-way proposal which would actually assure to any producer the right to belong or not to belong to a cooperative. . . . We certainly felt it is unfair to deny any man the right to sell his crop because he belongs to a group." 114 Cong. Rec. 7451 (1968).

The economic right to deal free of cooperatives includes the right to be free from compulsory financial support of cooperatives: "The fees being charged by these associations are no small matter to the farmer. . . . Some of these associations are assessing members 1 percent of their gross. That is $250 out of that farmer's pocket to belong to the association." 114 Cong. Rec. 7450 (1968) (remarks of Representative Latta). Congress was obviously concerned with a farmer's economic right to trade

in a free market, and not with the hollow associational right not to be a formal cooperative member.

2. *The Michigan Act Destroys A Non-Consenting Farmer's Right To Deal Free of Cooperatives.*

The language of Section 2303 of the Federal Act and the abundant legislative history clearly show that Congress intended to protect a farmer's right not to join, deal through, or contract with an association. If, therefore, a group of farmers in a cooperative association coerced an unwilling farmer into marketing his produce through the association, the cooperative's conduct would clearly violate Section 2303.

In contrast, the Michigan Act decrees that after an association is accredited, an individual farmer in that association's bargaining unit may no longer negotiate individually with a processor for the sale of his crops. Instead, the farmer is bound by the terms and conditions of the association's contracts, and the association is legislatively appointed as his "exclusive representative". Mich. Comp. Laws § 290.713. The farmer is irrevocably bound by the activities of the association and must pay a service fee, even if he has not voluntarily joined that association. (See Michigan Supreme Court Opinion, J.S. App. A5-A8). The only difference under the Michigan Act between a "member" and a "nonmember" of an association is that a member has voluntarily appointed the cooperative association as his exclusive agent. Mich. Comp. Laws § 290.702(i).

Unlike the Federal Act, the Michigan Act does not prohibit cooperatives from coercing farmers in the exercise of their right to refrain from joining a cooperative. Mich. Comp. Laws § 290.704(2). The very essence of the Michigan Act is the coercion of non-consenting farmers for the

good of the cooperative. (*See* Michigan Supreme Court Opinion, J.S. App. A26).

It is hard to imagine a more complete abridgement of a farmer's federal rights than is created by the Michigan Act. Nothing remains of a Michigan farmer's right to refrain from joining an association. The Michigan Act allows a group of producers to band together and, so long as they represent a majority of farmers and product, impose their price, terms of sale and "service fees" upon all non-consenting farmers. This is precisely the conduct forbidden by Section 2303 of the Federal Act.

The Michigan courts concede that the Michigan Act destroys the right of non-consenting farmers to deal individually. The circuit court found that "the right to deal individually is gone" and that "the minority, for the good of all, are required to go along." (Opinion, J.S. App. A73). The court stated, however, that "[t]his suggested loss of freedom is no more significant than that lost by a non-union member employed in an agency shop." *Id.* In so holding, the circuit court limited the Federal Act's protection to the mere associational right not to be a formal cooperative member.

The circuit court's analogy is unfounded. Agency shops have been allowed in the labor law context because such arrangements are *specifically authorized* by federal law. Section 7 of the National Labor Relations Act provides that:

> Employees shall have the right . . . to bargain collectively . . . and shall also have the right to refrain from any or all such activities *except* to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

29 U.S.C. § 157 (emphasis added).

Section 8(a)(3) of the National Labor Relations Act authorizes an employer and a union to agree to require employees to join the union. 29 U.S.C. § 158(a)(3). Thus, in the labor law context, the NLRA itself authorizes certain types of mandatory representation of employees, as an exception to the general "right to refrain" from collective bargaining. In *N.L.R.B. v. General Motors Corporation*, 373 U.S. 734 (1963), this Court held that agency shop agreements were lawful because Congress had authorized agency shops in section 8(a)(3) of the National Labor Relations Act, and its predecessor section 8(3). The Court found that Congress passed section 8(a)(3) precisely because it feared that the general right to refrain from joining a union might bar union security arrangements. 373 U.S. at 738-39.

The Court also noted in *General Motors* that the distinction between an agency and a union shop "is more formal than real." 373 U.S. at 744. Although the Court acknowledged that some individuals may consider it important that they need not be union members, Mr. Justice White observed that an individual's position in an agency shop is "the practical equivalent of union 'membership.'" 373 U.S. at 743.

The Agricultural Fair Practices Act is not comparable to the Wagner Act. The Federal Act, like section 7 of the Wagner Act, provides that a farmer shall have the right to refrain from joining a collective bargaining association. Unlike the Wagner Act, however, the Agricultural Fair Practices Act does not carve out an exception for agency shops. Instead, the right to refrain from joining an association stands unmodified, as an absolute right.

The Michigan Act is therefore not saved by its protection of the hollow right not to become a formal member of the cooperative. Mich. Comp. Laws § 290.704(1)(a).

Limitation of the right conferred in Section 2303 to a mere associational right finds no support in the language or history of the Federal Act and amounts to a complete nullification of the Act's provisions.

The Michigan Supreme Court did not embrace the circuit court's analogy to agency shops. (Opinion, n. 13, J.S. App. A10). The Supreme Court, however, did not deny that the Michigan law destroys the freedom of a non-consenting farmer to deal individually. According to the court, this effect of the Michigan Act does not contravene the Federal Act because the Federal Act was not "meant to affirmatively create or protect rights of private dealing between individual producers and processors." (See Opinion, J.S. App. A8). The sole goal of the Federal Act, the court said, was to protect the right to form cooperatives and to prevent "handler" coercion.

The state court was wrong on all grounds. First, the language of Section 2303, and its supporting legislative history, make it patent that Congress was protecting the "right to . . . *refrain from joining* or belonging to an association," 7 U.S.C. § 2303(a) (emphasis added), as well as the right to join associations. Congress could not have used more explicit language in the protection of the right to be free of an association, nor could the members of Congress have been more direct in their statements, quoted above, recognizing that right.

Second, the "handler" coercion prohibited by the Federal Act includes coercion by cooperatives themselves. A reading of the Michigan Supreme Court Opinion demonstrates that the court ignored this important fact. The state court expressly, and improperly, equated the terms "handler" and "processor" (Opinion, J.S. App. A5) and thereby nullified Congress' intent to protect individual farmers against associations themselves. Cooperatives are

"handlers" under the Federal Act (see discussion at pages 19-21 above), and the prohibition in Section 2303 against handler interference with the right not to join associations was intended to apply to cooperatives. There is accordingly no support for the proposition that the relationship between cooperatives and non-consenting farmers is federally "unregulated".

Finally, the Michigan Supreme Court erred in holding that the states are free to readjust the relationships between farmers and cooperatives because the Federal Act does not expressly "forbid" the states from doing so. (Opinion, J.S. App. A10). This Court has never required, as a prerequisite to preemption, that Congress expressly prohibit state law interference with federal law. The Supremacy Clause already does so. Nor has the Court entertained the thought that the states may empower one group to abridge private rights conferred by Congress upon another. The notion that the states are free to nullify federal law is a discredited one, antithetical to the Supremacy Clause. *Cooper v. Aaron,* 358 U.S. 1 (1958).

The states may enact laws whose effects are contrary to federal law only if Congress so ordains. The most familiar application of this concept is the doctrine enunciated in *Parker v. Brown,* 317 U.S. 341 (1943), which exempts from the antitrust laws the anticompetitive actions of the states. Believing that Congress intended the Sherman Act to affect only individual action and not actions of the state as sovereign, this Court held that anticompetitive state action is not preempted by the Sherman Act. 317 U.S. at 352.

Assuming the general application of this antitrust concept to other fields of regulation, the *Parker v. Brown* doctrine does not save but condemns the Michigan Marketing Act. In contrast to the Sherman Act's legislative

history, there is no indication that Congress sought to exempt state action from the operation of the Agricultural Fair Practices Act. Even if such an intent were presumed, it is clear that the scheme embodied in the Michigan Act does not constitute state action, as defined by this Court.

The immunity from preemption created by *Parker v. Brown* is only for true state action, that is, "official action taken by state officials." *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 591 (1976). Individual anticompetitive action, even if authorized, approved, encouraged or directed by the state, is not exempt. 428 U.S. at 591-93. This Court has established two standards for distinguishing state action from private action authorized or approved by the state. First, the challenged restraint must be one clearly articulated and affirmatively expressed in state policy. Second, the policy must be actively supervised by the state itself. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

The coercion of non-consenting farmers by accredited cooperatives under the Michigan Act does not fit this definition of state action. Assuming that the majority rule provisions of the Michigan Act reflect an articulated state policy, that policy is not supervised by the state in any way. Individual cooperative members band together to form associations. It is the association that sets prices, negotiates quality, quantity and other terms, and decides whether to agree or not agree with processors. The State of Michigan does not monitor market conditions, pass upon the prices or terms dictated by the association, or engage in any "pointed re-examination" of the program. *Id.* at 105. The state only makes the initial decision whether the association meets the representational and other statutory requirements for accreditation, and prohibits as an unfair practice any deviation from the terms dictated by the cooperative.

In this important respect, the Michigan scheme is precisely the same as those condemned in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Those cases make it clear that a state scheme compelling unwilling parties to adhere to prices privately established by others does not qualify as "state action".

In *Midcal*, the Court considered a state statute requiring the filing of resale price contracts or price schedules establishing the sale price of liquor. The prices filed by a single wholesaler bound all wholesalers in the area. The statute prohibited, as an unfair trade practice, sales by a wholesaler below the established price. The state did not attempt to review or adjust the prices so established. 445 U.S. at 99-100. The Court held that the scheme did not qualify for the state action exemption of *Parker v. Brown*, because the program was not actively supervised by the state. "The State simply authorizes price setting and enforces the prices established by private parties." 445 U.S. at 105.

Schwegmann involved a similar state law, which bound non-consenting retailers to resale prices set by contract between a wholesaler and other retailers. Deviation from the established prices was prohibited as an unfair practice. Even though the compulsion to adhere to the established prices was provided by state statute, the program did not constitute state action, because the state merely compelled adherence to privately established prices. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 593 n. 30 (1976).

As was true in *Midcal* and *Schwegmann*, the State of Michigan exercises no active supervision over the prices and terms of trade established by the cooperative. The

state merely authorizes private price setting and forbids deviation as an unfair practice. Non-consenting farmers are bound by the decisions of the cooperative "if a producer majority sees fit" (Opinion, J.S. App. A10), not as the result of the conscious act of the state as sovereign. This is a far cry from the market proration system sanctioned in *Parker v. Brown*. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 591 n. 24 (1976).

In light of these authorities, the reasoning of the Michigan Supreme Court is seriously flawed. Even accepting the court's premise that the Federal Act was designed to affect only the coercive conduct of individual handlers, the states are not free to lend their coercive power to the private decisions of the cooperatives. The Michigan Act merely authorizes accredited associations to do what the Federal Act forbids. As this Court has stated, "a state does not give immunity to those who violate [federal law] by authorizing them to violate it, or by declaring that their action is lawful." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980), *quoting Parker v. Brown*, 317 U.S. 341, 351 (1943).

As a consequence, there is an irreconcilable conflict between the Federal Act and those sections of the Michigan Act that directly result in the destruction of a non-consenting farmer's right to deal free of a cooperative. [Sections 10(1) (third and fifth sentences); 10(2) (final sentence); 13(1) (third sentence)].[3]

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3. To the extent that other challenged sections prevent processors from negotiating with non-members of the cooperative, those provisions are likewise void. [Sections 4(1)(g), 4(1)(h)]. The right of a non-consenting farmer to deal free of cooperatives would be meaningless if all processors were nevertheless restrained from dealing with the farmer.

C. The Michigan Act Undermines The Federal Act's Objective Of Preserving A Competitive Marketing System In Which Processors Are Free To Deal With Farmers Of Their Choice.

The language and legislative history of the Federal Act demonstrate Congress' intent to preserve a free market system, in which processors would not be forced to deal with cooperatives. The Michigan Act completely contravenes this objective.

Congress enacted section 5 of the Federal Act to make clear the limits of cooperative power. While prohibiting discrimination against farmers on account of their membership in a cooperative, Congress denied to cooperatives the power to compel producers to bargain with them:

> *Disclaimer of Intention to Prohibit Normal Dealing.* Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association of producers.

7 U.S.C. § 2304.

The Act's legislative history demonstrates that section 2304 is the result of Congress' deliberate balancing of competing interests. As noted above, the original versions of the agricultural marketing bill contained no recognition of processors' rights. (See discussion in Section II.A. above). During Senate hearings in 1966, Senators and witnesses expressed concern that the bill would substitute a mandatory collective bargaining system for the existing free market system. *See, e.g.*, Hearings on S.109 Before the Subcomm., of the Senate Comm. on Agriculture and Forestry, 89th Cong., 2d Sess. 49, 124, 194, 196, 202 (1966).

The American Farm Bureau, the bill's original proponent, attempted to dispel these fears. The Farm Bureau spokesman testified: "We want to emphasize that Farm Bureau does not seek, and will not support, legislation . . . to force processors to negotiate with marketing associations." *Id.* at 15.

The Justice Department also objected to the bill's possible coercive effects on processors. The Department opposed the original bill because it could be interpreted as forcing purchasers to buy through associations, without freedom to negotiate with individual farmers. May, 1967, Senate Hearings, *supra* page 15, at 107-108 (Letter by Deputy Attorney General Ramsey Clarke to House Judiciary Committee Chairman Cellar, July 25, 1966).

The bill, as reintroduced in 1967, still did not address the rights of processors. S.109, 90th Cong., 1st Sess. (1967), *reprinted in* May, 1967, Senate Hearings, *supra* page 15, at 1-3. Opposition persisted on the ground that the bill was in effect a Wagner Act, endorsing or allowing unions in the farm industry. *See* 113 Cong. Rec. 7409 (1967). Witnesses again called for explicit protection of the processors' right to refuse to deal with associations and to purchase from farmers of their choice. May, 1967, Senate Hearings, *supra* page 15, at 86, 91. Proponents of the bill assured the Senators that the bill would not impair free competition or institute compulsory bargaining. For example, Senator Lausch, a co-sponsor of the bill, testified that "this bill does not at all deprive the purchasers or what are called handlers in the bill, of the right to choose from whomever they wished to buy. That is their Constitutional right." *Id.*, at 14.

In response to these concerns, the Senate Committee added a new section 5 (now 7 U.S.C. § 2304), to make it absolutely clear that the bill did not provide for a

compulsory union system of bargaining. While protecting the rights of farmers to voluntarily establish cooperatives, the bill was not intended to prevent the operation of a purchaser's legitimate, economic reasons for dealing or not dealing with the cooperative. S. Rep. 474, *supra* page 16, *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1873.

The Senate passed the bill as amended in committee. Debate continued in the House over the amendments. The original proponents of S.109 complained about the inclusion of "undeserved and unnecessary protection" for processors, as a retreat from the bill's original intent. Hearings on S. 109 Before the House Comm. on Agriculture, 90th Cong., 1st Sess. 72 (1967) (hereinafter "House Hearings"); *see, id.* at 69, 79, 89-90, 150-51. Supporters emphasized the necessity to maintain a competitive marketing system in which economic freedom was preserved. Representative Schwengel testified that the bill as amended "would not end competition by preventing other purchasers from offering a producer a better price or contract than is available through his marketing association. . . . The rights of purchasers are protected . . . purchasers are free to deal with whomever they choose. This includes the right to refuse to deal with a marketing association." *Id.* at 38.

After hearings, the House Committee defeated a proposed amendment that would have eliminated section 5, relying in part on the need to preserve "the threads of compromise which hold this legislation together." H.R. Rep. 824, 90th Cong., 1st Sess. 5 (1967).

The bill reached the House floor. Representative Poage, Chairman of the Agriculture Committee, assured the House that the bill was not a "bargaining rights bill . . . nor does it propose to set up a closed shop." 114 Cong. Rec. 7453 (1968). The bill, including section 2304,

passed. Two federal district courts have since interpreted it as protecting a purchaser's right of individual dealing. *Garrison v. Dairymen, Inc.*, Civ. Action No. 80-1080-3, slip op. (D.S.C. July 28, 1980); *Butz v. Lawson Milk Co.*, 386 F. Supp. 227, 237 (N.D. Ohio 1974).

It would be an overstatement to say that section 2304 *creates* the right of purchasers to choose their own suppliers. Congress realized that it was not legislating on a clean slate, and that both purchasers and suppliers already enjoyed the right to choose their own customers. Legislators considered these pre-existing rights as "inherent" or "constitutional". *See, e.g.*, May, 1967, Senate Hearings, *supra* page 15, at 14 (statement of Senator Lausch); House Hearings, *supra* page 33, at 16-17 (statements of Representative Jones). Witnesses characterized the freedom to deal as "fundamental" and traced it to this Court's decision in *United States v. Colgate & Co.*, 250 U.S. 300 (1919). *See* May, 1967, Senate Hearings, *supra* page 15, at 42, 91; House Hearings, *supra* page 33, at 97, 149.

Congress was therefore not concerned with the creation of purchasers' rights, since those rights already existed. The crucial question for Congress was the extent to which these pre-existing rights should be abridged or curtailed by the newly-created rights of cooperatives. It was this question that Congress addressed in section 2304. Congress decided to curtail pre-existing freedom to the extent of prohibiting refusals to deal motivated by discrimination against cooperatives. Congress preserved pre-existing freedom to choose one's suppliers for legitimate, economic reasons and decided against compulsory bargaining. By the enactment of section 2304, this careful balancing of the interests became national policy.

The Michigan Supreme Court acknowledged that a purchaser's freedom to deal individually with a farmer is

destroyed by the Michigan Act. (Opinion, J.S. App. A5-A8). Under the Michigan Act, an accredited association is the exclusive representative of all producers in the bargaining unit for the purpose of bargaining with all handlers. Mich. Comp. Laws § 290.713. The handler must bargain with the association if he has had previous, substantial dealings with it or farmers included in its bargaining unit; individual negotiation with farmers is prohibited. Mich. Comp. Laws § 290.704(1)(g), (h). If a processor does not choose, for whatever reason, to bargain with the association, he is barred from purchasing any quantity of the commodity produced by the unit. Mich. Comp. Laws § 290.715. In short, handlers are forced to deal with cooperatives.

In order to avoid the obvious conflict in statutory policies, the state court treated section 2304 as meaningless surplusage. The court held that section 2304 did not represent a balancing of rights by Congress and so does not preclude "a state from choosing to readjust pre-existing freedom to deal." (Opinion, J.S. App. A14).

In so holding, the court read section 2304 out of the Federal Act and pretended as if Congress had passed an earlier version of the bill. Section 2304 was the product of years of congressional debate. It was consciously added to the bill by the Senate and consciously retained by the House. Congress did not treat section 2304 as meaningless. The members of Congress believed that they were preserving a competitive system and protecting the right of a purchaser to be free from compulsory bargaining. They were entitled to assume that the states would not undermine this system.

In summary, the challenged provisions of section 4 and 13 of the Michigan Act upset the balance established by Congress in section 2304 of the Federal Act.

III. THE MICHIGAN ACT'S FRUSTRATION OF FEDERAL RIGHTS AND POLICY REQUIRES ITS PREEMPTION.

This Court has long held that a state statute must fall if it "stands as an obstacle to the accomplishment and execution of the full objectives and purposes of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). A state statute is therefore preempted if its effect is the frustration of federal rights or policy, regardless of the state law's purpose. *Perez v. Campbell*, 402 U.S. 637, 650-52 (1971). Under these principles, the Michigan Act is void.

A state statute stands as a clear obstacle to federal law if it destroys a federal right. *See, e.g., Ridgway v. Ridgway*, 454 U.S. 46, 54-55 (1981). This most patent of preemption standards invalidates those provisions of the Michigan Act that destroy a farmer's federal right not to join or deal through cooperatives. (See Section II. B. above). The destructive effect of state law on this federal right is clear and inescapable.

But the preemption doctrine is not limited to preventing the destruction of federal rights. This Court has invalidated state laws that do not destroy federal rights but merely interfere with federal policy. For example, the Court has voided a state unfair competition law that purported to prevent the copying of unpatented articles. *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964). The federal patent laws do not expressly allow copying of unpatented articles, nor do they forbid the states from doing so. The state law was void not because it destroyed a federal right, but because it interfered with federal policy and afforded "protection of a kind that clashes with the objectives of the federal patent laws." 376 U.S. at 231. *See also Perez v. Campbell*, 402 U.S. 637 (1971).

A state law similarly frustrates federal policy if it balances competing interests in a manner inconsistent with the approach taken by Congress. Even when the state and federal laws share a common goal, if the method chosen by the state to further that goal upsets the balance struck by federal law, the state law must fall. *See Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982); *Mite Corp. v. Dixon*, 633 F.2d 486 (7th Cir. 1980), *aff'd on other grounds sub nom. Edgar v. Mite Corp.*, 457 U.S. 624 (1982); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979); *Rogers v. Larson*, 563 F.2d 617, 626 (3d Cir. 1977), *cert. denied*, 439 U.S. 803 (1978).

It is this principle that voids the provisions of the Michigan Act which compel processors to deal with associations, because those provisions frustrate the policy of the Federal Act. Congress carefully considered the manner in which farm bargaining should be regulated. It explicitly rejected the approach taken by the Michigan legislature. Congress instead envisioned a free market system and embodied that system in a statute designed to establish the "rules of the road". May, 1967, Senate Hearings, *supra* page 15, at 14. The Federal Act accordingly expresses a national policy accommodating the conflicting interests of farmers, associations and processors. Michigan cannot upset this balance by rejecting the free market system established by Congress and substituting its own set of conflicting rules.

The Michigan Act must give way to conflicting federal policy. That conclusion "is but the necessary consequence of the Supremacy Clause of our National Constitution." *Ridgway v. Ridgway*, 454 U.S. 46, 55 (1981).

RELIEF REQUESTED

Appellants pray that this Court declare the challenged provisions of sections 4, 10 and 13 of the Michigan Act to be in conflict with the Federal Act and therefore unconstitutional; that the contrary judgment of the Michigan Supreme Court be reversed; and that appellants be awarded their costs.

Respectfully submitted,

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No. 82-1577

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC.; and FERRIS PIERSON,

Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC.,

Appellees.

On Appeal From the Supreme Court of Michigan

BRIEF FOR APPELLEE AGRICULTURAL MARKETING AND BARGAINING BOARD ON THE MERITS

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QUESTION PRESENTED

WHETHER CERTAIN PROVISIONS OF THE MICHIGAN AGRICULTURAL MARKETING AND BARGAINING ACT ARE PREEMPTED BY THE FEDERAL AGRICULTURAL FAIR PRACTICES ACT OF 1967.

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No. 82-1577

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.;
INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.;
DUKESHERER FARMS, INC.; and
FERRIS PIERSON,
Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC.,
Appellees.

On Appeal From the Supreme Court of Michigan

COUNTER-STATEMENT OF THE CASE

A. Nature of the Case

In 1967, Congress enacted the Agricultural Fair Practices Act of 1967, 7 USC §§ 2301 *et seq* ("AFPA"). In its findings and declaration of policy the AFPA states that it is the policy of Congress to "establish standards of fair practices required of handlers in their dealings in agricultural products." 7 USC § 2301. The AFPA seeks to accomplish this goal by defining prohibited practices by handlers and granting the United States Department of Agriculture authority to enjoin such practices.

In 1972 the Michigan Legislature enacted the Agricultural Marketing and Bargaining Act, 1972 PA 344, as amended, Michigan Compiled Laws ("MCL") 290.701 *et seq*; MSA 12.94(101) *et seq* ("Michigan Act"). The Michigan Act is enabling legislation which affords farmers the option of joining together and bargaining collectively. Like the AFPA the Michigan Act defines prohibited practices by handlers. Both acts seek to advance the efficient production and marketing of agricultural products by protecting the marketing and bargaining position of the individual producers. While the AFPA attempts to do this solely through limiting handler coercion, the Michigan Act extends into an area not regulated by Congress. Under the Michigan Act, a framework for a marketing and bargaining procedure is implemented should a majority of the farmers producing a majority of the agricultural commodity so choose. The Michigan Act is not pre-empted because it does not stand as an obstacle to the full purposes and objectives of the AFPA.

B. Challenged Provisions of the Michigan Act.

Appellee Agricultural Marketing and Bargaining Board accepts Appellants' Statement of the Case with respect to the challenged provisions of the Michigan Act.

C. Parties

Appellee Agricultural Marketing and Bargaining Board accepts Appellants' Statements of the Case as it relates to the Parties.

D. Proceedings Below

Appellee Agricultural Marketing and Bargaining Board accepts Appellants' Statement of the Case with respect to the proceedings below.

SUMMARY OF ARGUMENT

The Michigan Act allows the producers of perishable fruit and vegetables the opportunity to join together and bargain collectively. The Michigan Act sets forth an argricultural marketing and bargaining procedure to be followed only when a majority of the growers representing a majority of an argricultural commodity produced so choose.

The Michigan Act is not preempted by the AFPA. Congress has not preempted the field of regulation with regard to agricultural marketing and bargaining nor does the Michigan Act stand as an obstacle to the accomplishment of the full purposes and objectives of the AFPA.

The opportunity for a farmer to join or not join an association does not derive its existence from the AFPA—farmers could avail themselves of such action prior to its enactment. The AFPA was enacted solely to prohibit discriminatory practices from being used by handlers against farmers engaged in the process of joining or forming a cooperative association. The legislative history is devoid of any indication that Congress sought to erect a barrier to state regulation of agricultural marketing and bargaining, such as the Michigan Act.

The disclaimer section of the AFPA, 7 USC § 2304, neither creates nor secures in processors a right to deal with individual producers. It does no more than what its caption suggests: a disclaimer of intention to prohibit normal dealing. Its purpose was solely to define the limits of what Congress sought to accomplish through its enactment of the AFPA.

The Michigan Act like the AFPA fosters and promotes the efficient production and marketing of agricultural products by

protecting the marketing and bargaining position of individual producers. Because the purposes and objectives of both acts are in such close alignment there is no preemption.

ARGUMENT

I.

PRINCIPLES OF PREEMPTION.

The doctrine of federal preemption is rooted in Article VI, Clause 2 of the United States Constitution, the "Supremacy Clause", which elevates federal law above that of state law. On the other hand, under the 10th Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Where Congress legislates in an area which the states have traditionally occupied, analysis of whether preemption has occurred must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v *Sante Fe Elevator Corp*, 331 US 218, 230 (1947). Only when persuasive reasons exist that "the nature of the regulated subject matter permits no other conclusion" or where "Congress has unmistakably so ordained" that its enactments alone are to regulate a part of commerce, must state laws regulating a particular aspect of commerce fall. *Florida Lime and Avocado Growers, Inc* v *Paul*, 373 US 132, 144 (1963).

Preemption of state law will follow when such congressional mandate is explicitly stated in the federal statute's language or implicitly contained within its structure and purpose. *Jones* v *The Rath Packing Corp*, 430 US 519, 525 (1977). "The super-

vision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern." *Florida Lime and Avocado Growers Inc, supra,* 373 US at 144. Appellants correctly concede that Congress did not intend to occupy the entire field of regulation and thereby prohibit the States from enacting laws relating to agricultural marketing and bargaining. (Brief of Appellants on the Merits, p 11).

"Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute." *Ray* v *Atlantic Richfield Co,* 435 US 151, 158 (1978). A conflict will be found when " 'compliance with both federal and state regulations is a physical impossibility . . . or when the state law stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress'." *Fidelity Federal Savings and Loan Assoc* v *de la Cuesta,* 458 US 141, 153 (1982).

While arguing generally that the AFPA and the Michigan Act are fundamentally inconsistent with one another, Appellants' argument centers on two alleged "conflicts". First, the Michigan Act ostensibly destroys a "farmer's right not to join or bargain through a cooperative", a "right" said to be created by 7 USC § 2303. The second conflict asserted is that the Michigan Act is contrary to an alleged Federal policy of protecting a processor's "right" to deal with farmers individually. A careful review of the pertinent provisions of the AFPA and underlying legislative history, however, demonstrates that there is no conflict between the purposes and objectives of the AFPA and the Michigan Act.

II.

THE AGRICULTURAL FAIR PRACTICES ACT DOES NOT PREEMPT THE MICHIGAN ACT WITH REFERENCE TO AN ALLEGED RIGHT OF NON-MEMBER PRODUCERS TO REFRAIN FROM JOINING COOPERATIVE ASSOCIATIONS.

A. The Michigan Act Is Consistent with the Purposes and Objectives of the AFPA and Does Not Require Producer Membership in a Cooperative Association.

The Michigan Act and the AFPA share a common purpose in that they both seek to permit farmers to associate together and thereby improve their marketing and bargaining position with food handlers. To this end both acts prohibit certain conduct, designated as unfair practices, by both handlers and associations of producers. 7 USC § 2303; MCL 290.704. The primary distinction between the two is that under the Michigan Act an association may become "accredited" and act as the exclusive sales representative for all those producers in the bargaining unit. MCL 290.710(1). Such producers are then bound, when dealing separately and individually with a handler, by all terms and conditions of the contract negotiated with handlers. For the services performed by the "accredited" association in its collective bargaining role a marketing service fee is charged to all producers in the bargaining unit. MCL 290.710(1).

The Michigan Act, standing alone, does not automatically require the imposition of a collective bargaining framework on the sale of a particular commodity. Rather, it is the producers who must decide whether or not they wish to avail themselves of its provisions. Moreover, the "accreditation" of the associa-

tion by the Board is subject to a statutory revocation process upon petition by the farmers. MCL 290.710(2); MCL 290.712.

A bargaining unit may only be established when the Agricultural Marketing and Bargaining Board, a state agency, has received a petition from not less than 10% of the producers of the commodity. MCL 290.706(1). Should the Board determine that a bargaining unit is appropriate, an association is eligible to become "accredited" provided it has signed contracts[1] from more than 50% of the producers of an argricultural commodity who produce more than 50% of that commodity. MCL 290.707(c).

The accreditation procedure is initiated by the association filing a written request with the Board. MCL 290.708(1). The request must contain properly certified evidence that the association meets the standards for accreditation along with names and addresses of all members who delivered the agricultural commodity to a handler during the two preceding marketing periods. MCL 290.708(1). The Board, for verification, may then require all handlers of an agricultural commodity to provide a certified report showing the names and addresses of all producers who delivered the agricultural commodity during the two marketing periods preceding the filing of reports and the quantities of the agricultural commodity received by the handler. MCL 290.708(2). If the Board determines that insufficient evidence was filed by the association, the Board, in its discretion, may permit the filing of an amended request by the association. MCL 290.709(1). Should the Board make a pre-

[1] The contracts must specify: (1) the agricultural commodity; (2) provide that such producers have appointed the aassociation as their exclusive agent in negotiations with handlers for prices and other terms of trade with respect to the sale and marketing of the agricultural commodity; and (3) obligate them to dispose of their production or holdings of the agricultural commodity through or at the direction of the association. MCL 290.707(c).

liminary finding that the association is to be accredited, a public hearing must be held to obtain further evidence relevant to the question whether the association is to be accredited. MCL 290.709(2).

Before the hearing may be commenced, all producers of record involved in the bargaining unit must be notified of the hearing by mail. MCL 290.709(2). In addition, a public notice must be published in a newspaper of general circulation in the bargaining unit area. MCL 290.709(2). The Board must render its final determination within 30 days from the date of the hearing. MCL 290.710(1). However, the Board must delay the accreditation of the association if it receives within the 30 day period a petition signed by 1/3 of the producers growing at least 1/3 of the commodity produced. In that event a mail referendum of all producers in the bargaining unit must be conducted. MCL 290.710(2). The referendum must verify that the majority of growers growing a majority of the commodity so assent. MCL 290.710(2). Only after all the procedural steps in the Michigan Act have been satisfied may the association be "accredited".

While the "accredited" association is designated as the exclusive sales representative for all producers in the bargaining unit, the practical effect is that not all producers or all the quantity of the agricultural commodity produced is subject to representation by that association. First, only those persons who have produced $1,250.00 or more of the commodity are included in the bargaining unit.[2] Handlers may continue to

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[2]

Rule 3 of the rules promulgated by the Agricultural Marketing and Bargaining Board provides:

> "The minimum value at first point of sale for an agricultural commodity that a person must have produced to be a producer of a commodity and included in a bargaining unit for the commodity shall be $1,250.00. However, the agricultural marketing and bar-

deal directly with such producers despite the accreditation. Second, the Board must exclude from the bargaining unit any quantity of the agricultural commodity contracted by producers with producer and controlled processing cooperatives. MCL 290.707(c). Third, any quantity produced by handlers is likewise excluded. MCL 290.707(c).

While non-members must pay marketing service fees, Rule 6 of the rules promulgated by the Agricultural Marketing and Bargaining Board limits both the amount and types of charges that may be assessed.[3] Moreover, the fees established by rule are subject to review by the Board upon petition by 15% of the producers. MCL 290.710(1).

Nothing in the Michigan Act requires a producer to become a member of, or join, an association. Indeed, many have not. Although the Michigan Act allows but does not require a maximum price to be agreed upon by the association and handlers, the practical effect of the Michigan Act has been only the establishment of a base price and minimum terms of trade. Producers have therefore been able to negotiate and receive a higher price than the price established by the association and handler. (See, e.g., testimony of Jack Leaver, trial transcript

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gaining board may determine that the minimum value at first point of sale should be larger based upon the evidence at the board's hearing to determine whether a proposed bargaining unit for the commodity is appropriate." Michigan Administrative Code 1979, R 290.103.

[3]
Rule 6.

"Marketing service fees for marketing and bargaining service provided producers in the bargaining unit shall be based solely upon the cost incurred by the association in providing the services. The fees shall not exceed 3% of the gross value of the commodity at the time of sale and shall not include costs of services to members that do not benefit non-members." Michigan Administrative Code 1979, R. 290.106.

pp 88-89; testimony of Rufus Dayton Hubbard, trial transcript, p 172; testimony of Harold Goodell, trial transcript pp 184-185.)

The Michigan Act is intentionally flexible so that it may not only reflect the wishes of the producers but that it may also respond to the ever-changing economic conditions which characterize the agricultural marketplace.

B. The Words "Refrain From Joining or Belonging to An Association of Producers" in 7 USC § 2303(a) Is Attributable to a Congressional Intent to Remain Neutral in the Question Whether Farmers Should Join Cooperatives.

The opportunity for a farmer to join or refrain from joining an association of producers does not derive its existence from the AFPA. As noted throughout the congressional debates, farmers could avail themselves of such action prior to the enactment of the AFPA, or, for that matter, prior to the enactment of the Capper-Volstead Act, 7 USC § 291-292.

The AFPA, the Capper-Volstead Act, and the Michigan Act seek to allow farmers to attain greater market power through combined effort. The Capper-Volstead Act effectuates this purpose by exempting farmer cooperatives from certain antitrust violations. The AFPA does so by prohibiting handlers from exerting discriminatory practices an improper pressure against farmers who are deciding whether to join an association. The Michigan Act, like the AFPA, prohibits such discriminatory practices by handlers, and additionally authorizes the implementation of a collective bargaining procedure when a majority of the farmers growing a majority of a commodity so agree.

The argument that the AFPA creates an unqualified and absolute right in the farmer not to join or bargain through a cooperative ignores Congress' longstanding policy creating an environment favorable to farmers' collective action.[4] Moreover, such an argument fails to recognize both the limited purpose of the AFPA and the reasons why certain language was used as is revealed in its copious legislative history.

The need for national legislation to prohibit unfair and coercive tactics employed by handlers to discourage farmers from forming, joining, or remaining in, an association was demonstrated when Senate hearings regarding the matter were convened on June 14, 1966. Farmers testifying at the hearings told of having purchases by handlers either reduced[5] or completely eliminated [6] as a result of their joining an association. Economic sanctions by handlers or their agents, however, represented only a part of the tactical inventory employed as farmers were subjected to intimidation[7] and other forms of disparate treatment.[8] Together the testimony vividly painted a picture of active discrimination by handlers.

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[4]

See, H.R. Rep. No. 824, 90th Cong, 1st Sess. 3 (1979).

[5]

See, *e.g. 1966 Senate Hearings, (June 14-16)* on S. 109, 89th Cong, 2nd Sess, 17-18 (statement of Robert Summer, Tiffin, Ohio), 28-32 (Statement of Ralph Gillmor, Freemont, Ohio).

[6]

Ibid, 84 (statement of Ellis Hale, Waldron, Arkansas).

[7]

Ibid, 86

"The first advertised meeting [of the association] in our county was held at the county courthouse in Waldron, Arkansas. As the farmers arrived at the appointed time we found that the local poultry company had cars and trucks parked strategically on the square around the courthouse. The poultry company officials were situated in the different approaches to the courthouse so that each farmer attending knew that he was being watched and it was

The problem of discrimination against farmers and farmer cooperatives was compounded by the fact that an appropriate remedy or expeditious federal recourse simply was not available. The cost of bringing and maintaining a civil action against a processor or processors was prohibitive. The handling of complaints registered with federal agencies proved to be both unsatisfactory and time consuming.[9] Moreover, the fact that large food suppliers secured their needed supplies from several states underscored the conclusion that only federal law could provide an antidote to the challenge of the changing economic organization in agriculture.[10]

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clearly evident that the poultry company was trying to discourage attendance. During the course of the meeting a poultry company truck with a loud or no muffler gunned or raced its motor near the courthouse for quite some time, drowning out the speaker's words."

[8]

See, *1966 Senate Hearings*, 17 (statement of Robert Summer, Tiffin, Ohio)

"Then, too, Heinz would give me only 40 hampers per acre. Others got twice as many. This made my harvest and deliveries very slow. It is not hard for processors to hurt you. They can decide who gets plants first in the spring, how to arrange delivery schedules, and many other things."

[9]

In Ohio, on two occasions, tomato growers attempting to organize were met with substantial processor resistance. Although the Federal Trade Commission issued a cease and desist order against processors, preventing conspiring and engaging in a planned common course of action to boycott certain tomato growers, it was set aside years later by the U. S. Court of Appeals. On the second occasion it became clear that while collusion among processors fell within the jurisdiction of the FTC, individual acts by these same processors against growers or their associations did not. See, R. Torgerson, *Producer Power at the Bargaining Table: A case study of the Legislative Life of S. 109*, at 3-6 (1970).

[10]

Ibid, 18.

What ultimately became the AFPA was originally proposed as an amendment to the Capper-Volstead Act as Senate Bill 109. In the staff report, S. 109 was described as "prohibiting certain purchasers of agricultural commodities from performing specified acts injurious to other producer cooperatives, e.g., interference with producers joining or continuing as members, discrimination against members, and making false reports".[11] S. 109's sponsor, Senator George D. Aiken, stated its purpose: "This bill does not in any way grant special privileges to farmers, to farmer cooperatives or to agricultural associations of any kind. It undertakes to give them the same rights and protection as are now enjoyed by the people they have to deal with".[12] Included in S. 109 in its original form as Section 3(a), was the forerunner to 7 USC § 2303(a) which made it unlawful for a handler "to interfere with, restrain, coerce, or boycott any agricultural producer in this exercise of his rights to join and belong to an association of producers of agricultural products."[13]

The 1966 Senate Hearings on S. 109 demonstrated wide support by farm groups. Proponents of the bill included Charles B. Shuman, President of the American Farm Bureau, who testified that although farmers had the opportunity to market through cooperative associations, such activity was not completely protected since the scales of bargaining power were weighted heavily in favor of buyers.[14] Two reasons were

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[11]

See, *1966 Senate Hearings*, 2.

[12]

See, *1966 Senate Hearings*, 2-3 (statement of Hon. George D. Aiken, a U.S. Senator from the State of Vermont).

[13]

Ibid, 2.

[14]

See, *e.g. 1966 Senate Hearings*, 10-15 (statement of Charles B. Shuman, President, American Farm Bureau Federation.

given for this imbalance in bargaining power. First, processors had grown to huge proportions through acquisitions, mergers and diversification. Second, farmers frequently had been discouraged by handlers from exercising their right to act cooperatively by reprisals and fears of reprisals.[15]

In his book chronicling the legislative history of S. 109, Dr. Randall Torgerson characterized the opponents of the bill as being divided into three groups: (a) those concerned about the antitrust overtones of the bill and the possibility that bargaining might curb competition; (b) those disturbed about the one-sidedness of the bill and for strategic reasons stressed protection for the farmers' right not to join an association; and (c) those who consisted of "fence riders" who would not take a firm position on the bill but nonetheless implied an attitude of opposition to it.[16]

Following the 1966 Senate Hearings a substitute version of S. 109 emerged. Rather than being an amendment to the Capper-Volstead Act, the substitute was to be a separate act and carried a new title: "Agricultural Producers Marketing Act of 1966". Also, the substitute version contained six sections instead of three as in the original.[17] Section 2, the Legislative Findings and Declaration of Policy provision, relevantly stated that "the marketing and bargaining position of individual farmers will be adversely affected unless they are free to band together in cooperative organizations authorized by law."[18]

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[15]
Ibid.

[16]
See, R. Torgerson, *Producer Power at the Bargaining Table: A Case Study of the Legislative Life of S. 109*, at 62 (1970).

[17]
See, *1966 Senate Hearings, Part II (September 28, 1966), A Substitute Amendment to S. 109*, 89th Cong, 2nd Sess, 175-177.

[18]
Ibid, 175.

The provision which ultimately became 7 USC § 2303(a), section 4(a) of the substitute,[19] like the earlier language, did not provide that a farmer had the right to "refrain from joining or belonging to an association of producers."[20] Clearly many of those speaking at the subsequent 1967 Senate hearings, in support of the substitute version, believed that such additional wording was unnecessary as farmers always could refrain from joining an association.[21]

Senator Lausche, a co-sponsor of the bill, commenting on the substitute stated: "This bill does not force farmers to belong to associations. That decision is completely up to them, being permitted to join or not to join."[22] Nevertheless, opponents of the bill continued to object to the prohibited practices section, maintaining it failed to protect a farmer from an association if that farmer chose to refrain from joining or belonging

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[19]

Ibid, 175.

[20]

The full text of Section 4(a) of the Senate substitute version provided:

> "Sec. 4. It shall be unlawful for any handler knowingly to engage or permit any employee or agent to engage in the following practices.
>
> (a) to interfere with or restrain, or threaten to interfere with or restrain, by boycott, coercion, or any unfair or deceptive act or practice, any producer in the exercise of his rights to join and belong to an association of producers. . . ." Ibid.

To like effect, see Section 4(a) as re-marked after the 1966 Senate Hearings, and which appears in 1967 Senate Hearings on S. 109, 90th Cong, 1st Sess (May 2, 4 and 11) at 2.

[21]

See, *1967 Senate Hearings*, 10 (Statement of Hon. John J. Williams, a U.S. Senator from the State of Delaware), 13-14 (Statement of Hon. Frank J. Lausche, a U.S. Senator from the State of Ohio), 21 (Statement of Hon. Orville L. Freeman, Secretary of Agriculture).

[22]

See, *1967 Senate Hearings*, 13-14 (statement of Hon. Frank J. Lausche, a U.S. Senator from the State of Ohio).

to that association.[23] While this argument was urged throughout the legislative genesis of the AFPA, not once was there ever presented any evidence of an association of producers coercing a farmer to join. Despite this fact, the bill, when reported out of the Senate Subcommittee and passed by the Senate, provided in section 4(a) that handlers and associations of producers were prohibited from actions to influence producers "to refrain from joining or belonging to an association of producers".[24]

Appellants urge that Senate's action in including such words in Section 4(a) created an absolute and unqualified right in the farmers to refrain from joining or bargaining through an association. This conclusion is not justified. The Subcommittee, and the Senate in passing the bill on August 4, 1967, no more sought to encourage farmers to join an association than it sought to encourage them to refrain from joining an association. Its position was one of decided neutrality on the question. Rather, the Subcommittee's change was in response to those who argued that S. 109 sought to encourage association membership, and represented the manifestation of its belief that Congress should remain neutral on the question whether a farmer should join an association. It was not its purpose to create a right for a farmer to (a) join an association or (b) refrain from joining an association. This was reflected in the Committee report:

> ". . . The committee did not have before it any testimony to indicate that producers were being subjected to any improper pressure to join associations, but was convinced

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[23]

See, *e.g. 1967 Senate Hearings*, 84 (Statement of Edward Dunkelberger, on behalf of the National Canners Association).

[24]

See, *1967 House Hearings on S. 109*, 90th Cong, 1st Sess (September 21 and 22, 1967), 2.

by the logic of the situation that if the objective is to protect the producer and afford him a free choice, the bill should protect him from pressure in either direction."[25]

The Senate's neutrality was also evinced in section 2 of the bill, the Legislative Findings and Declaration of Policy section, which pertinently stated: "the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together or not to join together in cooperative organizations as autrorized by law."[26]

The Senate version was then sent to the House where hearings were convened on September 21, 1967. Among the first to testify was Assistant Secretary of Agriculture John A. Baker who urged the deletion of the phrase "or to refrain from joining or belonging to" from Section 4(a),[27] on the basis that there was a clear lack of evidence of abuses by associations of producers.[28] "This language places in doubt longstanding congressional policy of promoting growth and development of farmer cooperatives. This language implies that farmers now need protection from their own cooperative organizations."[29]

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[25]

S. Rep. 474, 90th Cong., 1st Sess. (1967) as reprinted in 1968 US Code Congressional and Administrative News, p 1871.

[26]

See *1967 House Hearings*, 2.

[27]

See, *e.g.*, *1967 House Hearings* 10 (Statement of John A. Baker, Assistant Secretary of Agriculture; accompanied by John G. Bagwell, General Counsel, U.S. Department of Agriculture).

[28]

Ibid, 9.

[29]

Ibid. The government's reasoning was more forcefully put by its general counsel who stated at 16:

'. . . to come along now and have the Congress of the United States declare as a policy that farmers shall have a right 'not to

But the fundamental purpose of S. 109, to protect the farmer's choice whether to belong to an association and be free from discriminatory practices in crop marketing and bargaining, remained unchanged. This was reflected in the House Report following its hearing which stated "The purpose of this bill is to strengthen the competitive marketing system for agricultural commodities by creating several new legal remedies designed to prohibit certain unfair trade practices'.'[30]

The limited purpose of the bill was underscored by Rep. Poage, Chairman of the House Committee on Agriculture, during the House Debate:

> "It [AFPA] prohibits discrimination only when the discrimination is based upon the membership or lack of membership of a producer in an agricultural cooperative. And that is all there is to the bill. *It does not go into this question of marketing rights, it does not go into any of these ancillary questions,* it does not try to solve the question of labor and management. It simply tries to solve this one specific problem that we believe is important in a few instances in the United States." [Emphasis added.] [114 Cong. Rec. 7454 (1968)]

The House amended substitute S. 109 by engrafting thereon the provisions of H.R. 13541, and, as so amended, passed S. 109. See 114 Cong Rec 7468-7469 (1968). As passed by the

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join' in a bill of this sort simply confuses the issue of what we are trying to do. As everyone who is a lawyer in this committee room knows—and there are many of you here—it's an old saying among lawyers 'When you have a poor case, confuse the Court'. And if you want to confuse the Court, in my opinion, S. 109 as it came over from the Senate will do that pretty well, as to what the objective of that bill is and what we are trying to do."

[30]

See, H.R. Rep, No. 824, 90th Cong, 1st Sess 1 (1967).

House, section 2, the Legislative Findings and Declaration of Policy provisions, pertinently stated that "the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law." 114 Cong Rec 7469 (1968). The Senate thereafter concurred in the House amendments, and S. 109 was signed into law by President Johnson on April 16, 1968.

The congressional declaration in section 2, which appears as 7 USC § 2301, is one of deliberate neutrality. This Court has recognized the significance of such findings and statements. See, e.g. *Russello* v *United States*, ... US ...., 52 Law Week 4003 (decided November 1, 1983). Coupled with the declaration underlying 7 USC § 2305(d), amplified in Section III *infra*, at pages 23-25, that supplementary state law should not be superseded or preempted by the federal act, the majoritian-based collective bargaining mechanism that the Michigan Act employs to further effectuate the AFPA is constitutionally co-extensive and harmonious, as determined by the Michigan Supreme Court.

C. The Definition of a "handler" in the AFPA Should Be Limited Since It was Substantially Changed by A Last Minute House Amendment Which Was Not Debated.

Appellants make much to do about an association of producers being included within the definition of a handler within the AFPA. See 7 USC § 2302(a). But a review of the legislative history of this definitional section reveals that the intended scope of including associations within the definition was transformed by a last minute amendment on the House floor to which there was absolutely no debate or elucidation as to the significance of such a change.

As previously noted, some of those testifying against the original version of S. 109 remonstrated that it did not protect farmers from coercive tactics by an association attempting to influence a farmer's decision to join. See, II B, *supra*. The only logical reason advanced for making the prohibited practices applicable to cooperative associations was that *some* of these associations were in direct competition with handlers in acquiring agricultural commodities.[31] The Senate Subcommittee members conducting the hearings, although there was no evidence of coercive tactics being used by assocations, stated they were "convinced by the logic of the situation"[32] and inserted the term "association of producers" throughout the bill to insure that it would apply to associations of producers. After Senate approval of S. 109 it was sent to the House.

Following hearings before the House Committee on Agriculture an amendment was offered to delete the application of any prohibited practices or sanctions to associations of producers. The amendment was defeated. Explaining this action it was stated:

> "The committee felt that *in those limited instances* where cooperative associations are covered, the application of the bill is both justified and in the interest of the producers themselves." [Emphasis added.]
>
> H.R. Rep. 824, 90th Cong., 1st Sess. (1967)

Thus, the Committee report indicates that not all associations of producers would be subject to the AFPA's prohibition

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[31]

See, *e.g. 1968 Senate Hearings*, 135 (Statement of A. Starke Taylor, Jr., Independent Cotton Industries Association), 138-140 (Statement of Paul L. Courtney, National Association of Wholesalers).

[32]

See S. Rep. 474, 90th Cong, 1st Sess (1967) p 4.

or that associations might not be subject to such prohibitions at all times. Such an interpretation is considerably narrower than what has been alleged.

When S. 109 reached the floor of the House, Representative Sisk proposed several amendments striking of the words "association of producers." Such action was consistent with the Committee action, as Representative Sisk explained: "The Bill is clear, whether a handler of agricultural products is a proprietary business or a cooperative, it should not engage in specified unfair practices." See, 114 Cong. Rec. 7464. Additionally, Rep. Sisk indicated:

> "Since the bill already makes clear that association of producers are not excluded from the term 'handler', this phrase is redundant and could be misconstrued as unfairly pointing the finger of accusation to associations of producers. This is not the intent; and while my amendments do not change the purpose or basic meaning of the bill, they make misinterpretation more difficult."
> 114 Cong. Rec. 7464 (1968)

Thereupon, the Sisk amendments were debated and agreed to. Following the approval of the Sisk amendment Representative Latta then sought to amend S. 109. In his book *Producer Power at the Bargaining Table: A Case Study of the Legislative Life of S. 109*, at p. 196, Dr. Randall Torgerson provides the following account:

> "The next amendment was offered by Congressman Latta of Ohio, and in introducing it, Latta indicated that his proposals were those discussed earlier in a colloquy with Poage. However. when the Latta amendment was introduced, it contained more than the mere insertion of commas and the addition of the word 'or', as he had earlier

> indicated would be the case. Each of Latta's changes seemed aimed at the definition of the term 'handler' and seemed an attempt to assure that bargaining associations would be covered by the prohibitions of the bill. The intention became absolutely clear when Latta unexpectedly proposed including the words 'with or on behalf of' in the phrase relating to contracting. His additions changed the definition of handler to include 'any person engaged in the business or practice of . . . (3) contracting or negotiating contracts or other arrangements, written or oral *with* or *on behalf of* producers or associations of producers with respect to the production or marketing of any agricultural products.'"

The change went unnoticed and the scope of Section 3(a)(3) [7 USC § 2303(a)(3)] was thus enlarged to include all associations into the definition of a handler, rather than just those associations who acquired products and were in direct competition with other non-association food handlers. This last-minute maneuver was subjected to no debate or scrutiny—in stark contrast to virtually every other provision of the AFPA. Under these circumstances, the normal presumption — that "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended" (*Russello* v *U.S.*, *supra*, 52 Law Week at 4006)—should not be indulged.

III.

THERE IS NO INDICATION IN THE AGRICULTURAL FAIR PRACTICES ACT THAT CONGRESS SOUGHT TO ERECT A BARRIER TO STATE REGULATION OF AGRICULTURAL MARKETING AND BARGAINING.

The AFPA, 7 USC § 2305(d), pertinently states:

> "The provisions of this chapter shall not be construed to change or modify existing State law nor to deprive the proper State courts of jurisdiction."

This explicit declaration of non-preemption signals the congressional intent not to intrude upon a state's regulation of agricultural marketing and bargaining. Such action is consistent with this Nation's historic policy of favoring state regulation of agriculture. The language set forth in 7 USC § 2305(d) was crafted by the House Committee on Agriculture, which, in explaining its amendatory action, stated:

> "This amendment was adopted to clarify the committee's intent that no state law should be superseded or preempted by this legislation which is supplementary to and not in replacement of all other existing legal remedies." H.R. Rep 824, 90th Cong, 1st Sess 4 (1967)

The House Committee's wording expanded upon the much narrower substitute amendment to S. 109 that had passed the Senate, and which provided as Section 6(3) "the foregoing provisions shall not be construed to deprive proper state courts of jurisdiction." 1967 House Hearings (September 21 and 22) on S.109, 90th Cong, 1st Sess, 3. Thus, it is clear that Congress not only wanted to preserve existing state law but also sought to maintain a favorable climate for state regulation in the future.

With respect to state laws in existence at the time the AFPA became effective, the California Agricultural Producers Marketing Law, California Agricultural Code, § 59501 *et seq*, is of particular note.[33] This law is the successor to the California Agricultural Prorate Act, St. Cal. 1933, p 1969, which was reviewed by this Court in *Parker* v *Brown*, 317 US 341 (1943). The California Agricultural Prorate Act was found to represent "state action" and as such was exempt from the provisions of the Sherman Act which made combinations in restraint of trade illegal. While there are some minor differences between the present California law and its predecessor, the concept of state action embodied in both is identical. Moreover, the same concept of state action is to be found in the Michigan Act.

Under the California Agricultural Producers Marketing Law a minority of the producers of an agricultural commodity may petition for the establishment of a proration program. § 59641 [Prorate Act, § 8].[34] Upon receipt of the petition a hearing is conducted by the state Director of Agriculture[35] to determine the size of the proration zone and whether a program is consistent with developing orderly markets. § 59655-59659 [Prorate Act, § 9]. When a majority of the producers of an agricultural commodity who grow the majority of that commodity so assent a program is established. § 59855 [Prorate Act, § 11]. Once established all producers growing the crop

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[33]

The California Agricultural Producers Marketing Law, § 59501 *et seq* was enacted into law by Stats. 1967, c.15, § 2, and became effective November 8, 1967. The AFPA was signed into law by President Lyndon B. Johnson, in Honolulu, Hawaii on April 16, 1968.

[34]

Analogous provisions contained in The California Agricultural Prorate Act are cited after the applicable section of the current California Agricultural Code.

[35]

Under the Prorate Act the hearing was conducted by the Agricultural Prorate Commission.

are bound by actions of the program committee which includes limiting the amount of the commodity that may be sold in addition to requiring the producer to sell a certain amount to the committee, § 59803, 59807 [Prorate Act, § 19.1]. The program committe itself is composed not of state officials but of producers included in the proration zone § 59855 [Prorate Act, § 18]. For the services performed by the Committee all producers are assessed a fee, § 59941 [Prorate Act, § 21]. At any time after a program is instituted it may be terminated upon submission of a petition requesting termination and signed by not less than 40 percent of the producers of the commodity in the proration zone that produced not less than 40 percent of the commodity affected that was produced within the proration zone during the last preceeding season. § 59984 [Prorate Act, § 23].

The Michigan Act embodies virtually the same concept of state action. Producers of an agricultural commodity may petition for the establishment of a bargaining unit. MCL 290.706(1). The Agricultural Marketing and Bargaining Board, a state agency, must then make a determination as to the size of the bargaining unit. MCL 290.706(2). Should a majority of the farmers producing a majority of the commodity so choose, an association may become "accredited" and act as the exclusive representative of all producers in the bargaining unit. MCL 290.707(c). For the services performed by the association all producers in the bargaining unit are assessed a marketing service fee. MCL 290.710(1). Finally, an association's accreditation may be revoked at any time by a petition requesting disaccreditation and signed by at least 1/3 of the producers in the bargaining unit who produce at least 1/3 of the bargaining unit production of the agricultural commodity. MCL 290.712.

In conclusion, 7 USC § 2305(d) provides that existing and supplemental state law would not be preempted. The Mich-

igan Act was enacted in 1972, four years after passage of the AFPA. Its framework is substantially the same as the present California law, whose predecessor was sustained by this Court in *Parker* v *Brown, supra.* Accordingly, the Michigan Act, like the California law, is preserved by 7 USC § 2305(d).

IV.

THE MICHIGAN ACT IS VALID UNDER THE DOCTRINE OF STATE ACTION AS ENUNCIATED IN PARKER v BROWN

7 USC § 2303, in pertinent part, provides:

> "It shall be unlawful for any *handler* knowingly to engage or permit any employee or agent to engage in the following practices:
>
> (a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an assocation of producers, or to refuse to deal with any producer because of the exercise of his right to join and belong to such an association:
>
> • • •
>
> (c) To coerce or intimidate any producer to enter into, maintain, breach, cancel or terminate a membership agreement or marketing contract with an association of producers or a contract with a handler; . . ."
>
> [Emphasis added]

As the Michigan Supreme Court correctly noted (J.S. App. A9-A11),[36] 7 USC § 2303 is expressly directed toward *handler* misconduct. Such a prohibition, however, does not forbid a *state* from requiring the exclusive representation of farmers where a majority who are producing a majority of the commodity so desires, as under the Michigan Act.

A useful analogy is the California Agricultural Prorate Act of 1933[37] which was held not preempted in *Parker* v *Brown, supra.* In *Parker,* the plaintiff, a producer and packer of raisins, sought to enjoin the enforcement of a raisin prorate marketing program established pursuant to the California Agricultural Prorate Act. The express purpose of the program, as authorized by the California Act, was to conserve the state's agricultural wealth and prevent economic waste in marketing state products. 317 US at 346. One of the issues that arose during

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[36]

Citations to the appendix to the Jurisdictional Statement are made as follows: "J.S. App .....".

[37]

The similarities between the Michigan Act and the California Agricultural Prorate Act are pronounced. Both create a state agency composed of members appointed by the Governor and confirmed by the senate. Each is charged with enforcing the provisions of their respective acts. Under both acts, a specified number of producers may petition for the establishment of a program (California) or the establishment of a bargaining unit (Michigan). The public body in both instances is required to make a specific determination: in California—whether the institution of a program in a particular zone will prevent agricultural waste and conserve agricultural wealth; in Michigan—whether a proposed bargaining unit is appropriate. In both instances a committee or association, *composed of non-state officials,* is given authority to operate the program or conduct negotiations regarding terms of trade, after a majority of the producers who produce a majority of the commodity so approve. See, California Agricultural Prorate Act, § 19.1 "In any marketing program approved by the Commission, a program committee shall be empowered to determine the method, manner and extent of proration and the movement of the prorated commodity into a primary channel of distribution."

the course of the litigation was whether the California Act was in conflict with the Sherman Act which prohibited "every contract, combination . . . or conspiracy in restraint of trade or commerce among the several States." 317 US at 350. This Court assumed that had the prorate program been solely the product of a private combination of individuals or corporations, a violation of the Sherman Act would exist:

> "But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."
>
> 317 US at 350-351.

Significantly this Court then noted:

> "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Act is applicable to 'persons' including corporations [§ 7], and it authorizes suits under it by persons and corporations [§ 15]. A state may maintain a suit for damages under it, Georgia v Evans, 316 US 159, 86 L ed 1346, 62 S Ct 972, but the United States may not, United States v. Cooper Corp. 312 US 600, 35 L ed 1071, 61 S Ct 742—conclusions

derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, the subject matter, the context and the legislative history of the statute."

317 US at 351

The parallel to the instant case is striking in that a "state" is similarly excluded from the definition of a "person", 7 USC § 2302(d). Therefore, a state may not be construed as a "handler" under 7 USC § 2302(a). Similarly, in *Parker* v *Brown, supra,* there was no suggestion in the legislative history of the Sherman Act that its purpose was to restrain state action. Rather it was enacted to prevent only "business combinations." In conclusion this Court held in *Parker* v *Brown*:

". . . Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. *It is the state which has created the machinery for establishing the prorate program.* Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, *it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy.* The prerequisite approval by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. *The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application.* The required vote on the referendum is one of these conditions.

"The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." [Emphasis added]

317 US at 352.

Likewise, in the AFPA, Congress did not undertake to compel states, or restrain them, from enacting legislation which would enable farmers to improve their marketing and bargaining position when dealing with food processors. AFPA's purpose was to prohibit certain handler conduct. There is no suggestion in its legislative history which would indicate that action by a State was to be proscribed.

Appellants' Brief on the Merits, pp 27-30 ascribes considerable significance to subsequent decisions and opinions of this Court and its members which are claimed to have limited the scope of *Parker v Brown*. None of these subsequent cases, however, undermine the fundamental interpretational concept established by *Parker*—that the Congress, when enacting general economic legislation interdicting the actions of nongovernmental persons or entities, will be regarded as intending to preclude state legislation in related areas only if such intent is supported by underlying legislative history.

Although the doctrine of "state action" in *Parker* v *Brown* has been refined further in subsequent cases, none change the result that the Michigan Act is valid and non-preempted.

Schwegmann Bros v Calvert Corp, 341 US 384 (1951) involved a Louisiana statute which authorized the fixing of retail prices by private parties. Under that statute once a single retailer agreed with a distributor on a resale price all other re-

tailers were bound to sell at that price. 341 US at 387. Schwegmann Brothers, a retailer in New Orleans refused to agree to the price fixing scheme whereupon the Calvert Corporation brought suit under the Louisiana law to enjoin Schwegmann Brothers from selling its products at a cut rate price. The District Court granted an injunction which was affirmed by the Court of Appeals. This Court reversed and held that price fixing contracts were unenforceable against retailers who refused to agree to the price fixing scheme.

The holding in *Schwegmann*, however, may be distinguished from the present case on a number of grounds. First, the issue before the Court in Schwegmann was not the concept of "state action" which was set forth in *Parker* v *Brown*. Indeed the phrase "state action" does not appear once in Schwegmann. Rather the issue was how the Miller-Tydings Act, an amendment to the Sherman Act, 15 USC §1, was to be interpreted.

Second, in *Schwegmann*, two persons, one a retailer and one a distributor, could bind all other retailers and distributors with impunity. Their actions were not subject to review by other retailers or distributors or by a state agency. Under the Michigan Act, an association cannot become the exclusive sales representative of all producers in the bargaining unit until it has completed the rigorous statutory procedure for "accreditation". See II(a), *supra*. Additionally, even if the majority of the producers so consent and an association is accredited its accreditation is subject to revocation by the Board through a petition by the producers. MCL 290.712(b). The Michigan Act can be further distinguished in that a state agency has been created to monitor the activities of the parties. MCL 290.703. Should the parties be unable to agree they may request the Board to assist by mediation (MCL 290.714) or if no agreement is reached by the first day of the marketing period they must enter into binding arbitration. MCL 240.716. Finally, at various stages in the marketing and bargaining framework the

Michigan Act requires [38] compliance with the state Administrative Procedures Act, 1969 PA 306, MCL 24.201 *et seq*; MSA 3.560(101) *et seq*, which is applicable only to state agencies and not to disputes involving only private parties.

In *Goldfarb* v *Virginia State Bar*, 421 US 773 (1975), a minimum fee schedule for lawyers published by a county bar association and adhered to at the prompting of the state bar was struck down as being in violation of federal antitrust laws. The state action immunity doctrine as set forth in *Parker* was held not to apply. "The threshold inquiry in determining if an anti-competitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." 421 US at 790. Since the minimum fee schedule was initiated by the county bar and encouraged by the state bar, a self-regulatory body with no authority delegated by either the Legislature or high court to impose competitive restraints on the legal profession, its use was not immune as state action because it was not "compelled by the State acting as sovereign." 421 US at 791.

The Michigan Act meets the threshold standard set forth in *Goldfarb*. The collective bargaining model, which may become operative after a majority of growers representing a majority of the commodity grown so petition, is required by the State of Michigan acting as a sovereign. Moreover, similar to *Goldfarb* where this Court opined that the "interest of States in regulating lawyers is especially great" (421 US at 792), "agricultural marketing and supervision is of "peculiarly local concern." *Florida Lime and Avocado Growers, Inc, supra*, 373 US at 144.

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[38]

Compliance with the State Administrative Procedures Act, 1969 PA 306 is required by the Michigan Act at MCL 290.703(8); MCL 290.704(3); MCL 290.706(1); MCL 290.716(1); see also Opinion of the Michigan Supreme Court. J.S. App A26-A32.

This Court, in *Cantor* v *Detroit Edison Co*, 428 US 579 (1976) held that a lamp exchange program by a utility, regulated by the state public service commission, did not constitute state action. The Court limited the doctrine enunciated in *Parker* v *Brown* to "official action taken by state officials" 428 US at 591. The *Cantor* plurality held state action was not involved because: (a) no state officials or agencies were named as parties; and (b) no legislative act of the state was in question. In the present controversy not only is a state agency a named party but an act of the Michigan Legislature effectuating statewide agricultural policy is being directly challenged.

In *Bates* v *State Bar of Arizona*, 433 US 350 (1977) a statewide ban on advertising by attorneys was challenged on several grounds. Among those was the contention that the ban was in violation of the Sherman Act. A "state action immunity" defense was proffered and accepted by the Court. The holdings in *Goldfarb* and *Cantor* were distinguished from the controversy in *Bates*. The real party in interest, the Court noted, was the Arizona Supreme Court as it had adopted the rules and was the ultimate trier of fact and law in the enforcement process. 433 US at 361. Second, the state regulatory justification in *Bates* outweighed any federal antitrust policy. This was not the case in *Cantor* where the state had no independent regulatory interest in the market for lightbulbs. 428 US at 585.

With respect to the case at bar, it is clear that the State of Michigan is the real party in interest since it enacted the Michigan Act and provided for the option of mandatory collective bargaining. Moreover, the State, through its Agricultural Marketing and Bargaining Board, is the ultimate trier of fact with respect to alleged unfair practices and becomes actively involved when the parties are unable to agree upon terms of trade. Secondly, the regulatory justification for the

Michigan Act was well documented at trial, as the Michigan Supreme Court perceptively noted in its opinion.[39]

A California statute designed to remedy the disparity in bargaining power between automobile manufacturers and their dealers, by protecting retail car dealers from perceived abusive and oppressive acts by manufacturers, was upheld by this Court in *New Motor Vehicle Board* v *Orrin W. Fox Co*, 439 US 96 (1978). The California Act required an automobile manufacturer who proposed to establish a new retail automobile dealership to notify the California New Motor Vehicle Board. Notice was then given to existing dealers; upon dealer objection a hearing would be held to determine if there was good cause shown to refuse permission to open the new dealership. It was argued that by delaying establishment of automobile dealerships whenever competing dealers protested, the state scheme gave effect to privately initiated restraints on trade in violation of the Sherman Act. This Court held that the California Act represented a state-imposed system of regulation, clearly articulated and affirmatively expressed, and, therefore, outside the reach of the antitrust laws under the "state action" exemption. The California Act did not forfeit its antitrust exemption because it afforded existing dealers the opportunity to invoke a statutory right to be heard. The Michigan

[39]

"Our reading of the act, examination of the circuit judge's opinion and review of the record leads us to conclude that the AMABA was not directed toward achieving price security for producers at the expense of the operation of a free market, but was, instead, only intended to overcome an artificial obstacle to the operation of supply and demand forces, viz, the fortuitous position of handlers of perishable agricultural products in the chain of marketing such commodities which permitted handlers to distort free market forces by demanding prices not wholly reflective of supply and demand. AMABA is not a price fixing act, nor is it intended to allow association control of the output of individual farmers. It is, rather, an enabling act which seeks solely to promote the equalization of bargaining power between producers and processors of perishable products." J.S. App at A20-A21. See also, J.S. App A22-A25.

Act, by analogy, regulates the activity of both handlers and associations. The system of regulation is clearly set forth in an affirmative manner. The action by a majority of producers in exercising a statutory right to seek to be represented by an association does not forfeit the regulatory-based antitrust exemption.

In *California Liquor Dealers Association* v *Midcal Aluminum, Inc., et al*, 445 US 97 (1980), a statutory wine pricing plan was held not to constitute "state action". The test applied there was twofold. First, the challanged restraint must be "one clearly articulated and affirmatively express a state policy"; second, the policy must be actively supervised by the state itself. 445 US at 105. The California system for wine pricing was held to satisfy the first standards, as the legislative policy was clear and forthrightly stated in the statute. This Court, however, held that the program did not meet the second requirement:

> "The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program."
> 445 US at 105-106.

Applying the *Midcal* test, the Michigan Act clearly meets the first requirement, as the legislative policy is both clear and forthright. As to the second requirement, while the Michigan Act authorizes collective bargaining between an accredited association and handler through which the terms of trade may be established, the parties are not necessarily left to their own devices. If the parties are unable to agree, binding

arbitration by three arbitrators, paid by both the state and the parties, is required. MCL 290.716; 290.717.

Moreover, neither the accreditation of an association nor the establishment of a bargaining unit is irreversible. When one third of the producers growing one third of the commodity request the disaccreditation of an association, its accreditation will be re-evaluated by the Board and may be revoked. MCL 290.712. While such a re-examination of accreditation is initiated by the farmers and not the State, it is no different than the referendum required in *Parker*. "The state itself exercised its legislative authority in making the regulation and prescribing the conditions of its application." 317 US at 352. Similarly, the required number of farmers needed for the disaccreditation of an association is one of these conditions.

The Michigan Act as originally enacted contained a "sunset provision", MCL 290.727, which would have terminated the act's effectiveness at September 1, 1976, saving only negotiations or arbitration proceedings in progress at that time. In 1976 the Governor signed a repealer act [1976 PA 155] removing the "sunset provision." Thus, a "pointed re-examination," and re-authorization, by the legislative and executive branches of Michigan's state government has taken place. Further, the Michigan Act has survived rigorous judicial scrutiny.

The "state action" doctrine developed by *Parker* and its progeny provides a basis for the constitutional validity of the Michigan Act. While the Michigan Supreme Court did not specifically refer to *Parker* in its opinion, it is clear that the Michigan Act constitutes sovereign "state action" as it has been interpreted by this Court through the years.

V.

AGRICULTURAL FAIR PRACTICES ACT DOES NOT CREATE OR SECURE A HANDLER'S "RIGHT" TO DEAL WITH WHICHEVER PRODUCERS THE HANDLERS CHOOSE AND THEREFORE DOES NOT PREEMPT THE MICHIGAN ACT

A. The Disclaimer Clause Only Limits Scope of Agricultural Fair Practices Act.

The second "conflict" alleged by Appellants is the "handler's right to deal individually with a farmer", a "right" said to arise out of 7 USC § 2304, the disclaimer section of the AFPA. It is contended that this section of the AFPA was enacted to make clear the limits of cooperative power. This contention does not square with a plain reading of that section or its legislative history.

7 USC § 2304 states:

> "Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association."

The Michigan Act may not be said to force a handler to deal with an association inasmuch as it expressly provides otherwise:

> "At any time prior to 30 days before the first day of the marketing period, if an agreement on the issues in dispute between the accredited association and the handler has not been reached, the handler may elect not to purchase, directly or indirectly, any quantity of agricultural

commodity produced in the bargaining unit during the marketing period . . ." MCL 290.715.

Should the election afforded to the accredited association or handler not be exercised they then have 30 days to negotiate terms of trade. During this entire 30 day period the Board, on request of either party, will provide for mediation so as to "effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between the association and the handler which could disrupt the normal sale and purchase of agricultural commodity between producers and handlers." MCL 290.714. But should there still be issues in dispute on the first day of the marketing period the parties are deemed to have consented to settlement by arbitration. MCL 290.716(1). This bargaining process establishes an orderly market[40] for agricultural commodities, a common objective of AFPA and the Michigan Act.

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[40]

See, e.g. testimony of Dr. Randall Torgerson, trial transcript, p 1091

". . . through the bargaining process, farmers can hopefully even out some of these peaks and valleys; namely, the valleys from the farmer's viewpoint and achieving higher degree of price stability in the marketplace and thereby hopefully better returns. Obviously, you know, farmers are in the business to make a profit, and they've got to be in a position given their increasing investment and the cost of doing business in farming to have returns. Their risk and uncertainty that they face as producers given this high investment increases daily, just because the cost of doing business and adoption of the various forms of technology and so on increases, so through the process of negotiation they have the opportunity, I think, to achieve more price certainty in the marketplace and to develop this more parity of bargaining power.

Then I would say in addition, I think through this, by virtue of having the ability, number one, to have representation, number two, to have a say in the pricing process which individually they did not have, the Act provides from the producer's viewpoint an orderly mechanism—an orderly process for arriving at price grading terms and other things that are subject to negotiation."

See also, testimony of Dr. James D. Shaffer, trial transcript, p 1558-1561.

The Michigan Supreme Court correctly interpreted 7 USC § 2304, finding that it was nothing more than what its heading said: a "disclaimer of intention to prohibit normal dealing."

> "The language of section 2304 does not justify the meaning plaintiffs assigned to it. The disclaimer provisions, rather than having an operative effect, is essentially explanatory, beginning as it does with the phrase 'nothing in this chapter', referring to the substantive and affirmative provisions of the FAFPA. It neither requires nor prevents bargaining between handlers and individual producers or associations of producers. We do not discern from a provision termed a 'disclaimer of intention' a positive congressional intent to prohibit the conduct said not to be regulated. *There is no logical nexus between a provision declaring 'this is what we did not do' and the conclusion that 'what we did not do, cannot therefore be done'. Section 2304 is nothing more than an explanation of what FAFPA was not intended to do.* It did not in disclaiming any 'intention to prohibit normal dealing' thereby create or affirmatively protect an individual or handler's right to bargain with any producer, or an individual producer's right to bargain for himself. *It is simply,* aside from the disclaimer *neutral on that point.* Section 2304 cannot fairly be read as a statement of congressional intent to prohibit exclusive bargaining by producer associations. It is simply a statement indicating that FAFPA did not promulgate an exclusive bargaining system for marketing a producer's agricultural commodity." [Emphasis added] (J.S. App at A8)

The announced congressional finding contained in the declaration of policy at 7 USC § 2301 is consistent with the holding of the Michigan Supreme Court. There is no evidence in that declaration which would indicate a congressional intent to

affirmatively create in the handler a right to deal individually with the farmer.

B. The Legislative History Is Devoid of Any Indication That A Right Was Either Created or Secured by the Inclusion of The Disclaimer Clause.

The purpose of 7 USC § 2304 can also be found in its legislative history. The Senate Report from the Agricultural and Forestry Committee with respect to 7 USC § 2304 disavows any intent that Congress was creating a right in a handler:

> "Section 5 [7 USC § 2304] disclaims any intent to prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in an association of producers, or to prevent handlers and producers from dealing with one another individually on a direct basis, or to require a handler to deal with an association of producers. *The bill does not prevent or require these actions and is not intended to do so.* While the proponents of the bill state in their testimony that this was not the purpose, there was some concern, especially on the part of processors and other purchasers of agricultural products, that the bill in fact went further than intended. The committee felt that a clean statement in the bill itself would be helpful to courts, handlers, associations, producers, and others in their construction of this legislation and has recommended inclusion of this section in the bill.
>
> "There are many good, sound economic reasons for handlers and producers to select customers and suppliers. The bill does not attempt to prevent the sound reasons from operating.

"While the bill does not prevent handlers and producers from dealing with one another individually on a direct basis it does not prevent handlers from exerting any improper pressure in an effort to weaken associations or discourage membership. Although the bill does not require a handler deal with an association of producers, it certainly makes clear that farmers have a right to form such associations and should be protected in the exercise of this right. The fact is clear that an association of producers which has obtained the voluntary membership of a large number of farmers deserves respect and recognition by the handler of agricultural products." [Emphasis added]

S. Rep No. 474, 90th Cong 2d Sess, reprinted in 1968 US Code Cong. & Ad. News, p 1873.

Representative Sisk, during the floor debate in the House echoed the purpose of the disclaimer section when he explained:

". . . As the members will note section 5 is a 'disclaimer'. Its purpose was to say what the bill did not intend to do, and thereby allay the fears of some of its opponents." See 114 Cong Rec 7464 (1968)

Given the legislative history of 7 USC § 2304, the Michigan Supreme Court was correct in concluding:

"Section 2304's disclaimer of any congressional intent to affect pre-existing freedom to deal individually cannot be read as a creation of new rights or as an expressed new statutory protection of old rights; nor can it be read as precluding a state from choosing to adjust pre-existing freedom to deal." (J.S. App at A14)

Appellants argue that two district court cases provide authority for the proposition that a handler has a "right" to deal directly with a producer. *Garrison* v *Dairymen, Inc,* Civ. Action No. 80-1080-3, slip opinion (D SC, July 28, 1980) involved producers of milk who sought an injunction against a handler who refused to accept their milk unless they joined an association of milk producers. *Butz* v *Lawson Milk Co,* 386 F Supp 227 (ND Ohio 1974) concerned a handler that refused to deal with a producer who had assigned to a producer association the exclusive right to sell his milk. Although both Courts ruled against handler coercion, Appellants argue that in so doing, the "right of the handler to deal individually" with producers was found. Such an argument is directly traceable to *Butz, supra.* Upon a close reading of that case, however, it is clear that the "right" of the handler to which the Court was referring was not a statutory right but a pre-existing contractual right.

In *Butz,* a producer of milk had contracted with Lawson, a processor-handler. Under the terms of the contract the producer pledged that he had no agreement with an association to sell any milk which he produced. The contract further provided that if the producer entered into an agreement authorizing an association to sell his milk, Lawson would be relieved of all further obligations to purchase from the producer. Nevertheless, the producer did enter into a marketing agreement with an association.

The marketing agreement appointed the association as the sole and exclusive agent to sell all milk produced by the producer. In addition, it was provided that all other agreements or contracts with respect to the sale of milk were superseded so long as no conflict occurred with existing contracts. In the event that a conflict did occur between the marketing agreement and a pre-existing contract, the marketing agreement provided that the producer agreed to terminate such a

contract at the earliest possible date. When notified that the producer entered into a marketing agreement, Lawson immediately terminated its contract with the producer.

The ultimate conclusion of the district court was that Lawson's termination of its contract with the producer was unlawful and in violation of 7 USC § 2303(a) in that it represented a refusal to deal with the producer solely because of his joining the association. This result was based on the fact that under the terms of the contract and marketing agreement the producer might have been permitted to deal directly with Lawson despite the marketing agreement with the association. The Court's statement that 7 USC § 2304 is "to protect the right of the handler to continue to deal wih one of its producers directly even though he may become a member of an association," *Butz*, 386 F Supp at 227, was in reference to the pre-existing contractual right which Lawson had with the producer and which was still viable despite the fact that the producer had entered into a marketing agreement with the association. It was not a finding that 7 USC § 2304 created a "right" in that handler, or any other, to deal individually with the producer.

Neither *Garrison* nor *Butz*, stand for the proposition that the Michigan Act's requirement for exclusive representation for all growers of an agricultural commodity is in conflict with the AFPA. Moreover, if a handler does have a "right" to deal individually with producers who have joined an association, the prohibited practices sections of the AFPA would be rendered meaningless.

Whether compliance with both the AFPA and Michigan Act is a physical impossibility was resolved at trial. The Michigan Supreme Court rejected Appellants' argument that compliance with the AFPA and the Michigan Act is physically impossible, and in so holding distinguished both *Butz* and

Garrison (J.S. App at A16-A17). Moreover, it was testified at trial that the operation of marketing and bargaining under the Michigan Act will not "trigger" federal enforcement action under the AFPA. This fact was noted by the trial court when it stated in its opinion:

> "The plaintiffs have directed the Court to *Jones* v *Rath Packing, supra,* for the proposition that the federal government has preempted the field of regulation. This case, as the Court understands it, stands for the proposition that state law must fall if it 'triggers' federal enforcement action.
>
> *There is nothing in the proofs which would convince the Court of this possibility. In fact the proofs appear to the contrary. Witness Torgerson, a USDA official, indicated compliance with AMABA would not 'trigger' federal enforcement of AFPA.*" [Emphasis added] (J.S. App A74). See also, J.S. App A6-A11.

In light of the foregoing it is clear that the disclaimer section (7 USC § 2304) of the AFPA neither creates nor secures a handler's "right" to deal with whomever a handler may choose. Therefore, there is no preemption of the Michigan Act by the AFPA in this regard.

CONCLUSION

Appellee State of Michigan, Marketing and Bargaining Board, prays that this Honorable Court declare that the Michigan Act is not preempted by the AFPA and therefore constitutional; that the judgment of the Michigan Supreme Court be affirmed; and that this Appellee be awarded its costs.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC.; and FERRIS PIERSON,

Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC. ("MACMA"),

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF OF APPELLEE MACMA ON THE MERITS

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STATEMENT OF THE CASE

Appellants' constitutional attack on the Michigan Agricultural Marketing and Bargaining Act (hereinafter "Michigan Act" or "AMABA") began in 1974. In its 1976 Opinion the Michigan Supreme Court concluded that it would be imprudent to resolve the constitutionality of the Michigan Act where further factual development concerning the problems sought to be remedied by that Act would substantially contribute to the proper disposition of the case. J.S. App. A46. Consequently, an 11-day trial was held, after which the Circuit Court found the Michigan statute constitutional on all grounds, including federal preemption. In affirming that decision the Michigan Supreme Court carefully considered Appellants' preemption claim before rejecting it.

The Michigan Supreme Court concluded that the Federal Agricultural Fair Practices Act of 1967 (hereinafter "Federal Act" or "FAFPA") and the Michigan Act "seek to accomplish the same *general* purpose: to permit producers (farmers) to associate together in a marketing cooperative to enable them to improve their marketing and bargaining position when dealing with food handlers (processors)". J.S. App. A5. After describing the exclusive representation provisions contained in the Michigan Act the Michigan Supreme Court concluded that no provision in the Federal Act was meant to affirmatively *create* or *protect* rights of private dealing between individual producers and processors. The Michigan Supreme Court explained that the Federal Act sought to improve the bargaining position of individual producers by protecting them from handler coercion in their choice to join a cooperative marketing association.

While aware that the Federal Act's definition of "handler," unlike the Michigan Act's definition, included a producer association, and while not equating association financial support with formal association membership, the Michigan Supreme Court held that even if the Michigan Act were read as requiring a producer to join an association, that would not violate the Federal Act because it proscribes handler coercion, not state action. J.S. App. A10.

The Michigan Supreme Court found no basis for Appellants' claim that the Michigan Act stands as an obstacle to the accomplishment and execution of the full purposes of Congress. The Court concluded that the challenged aspects of the Michigan Act constituted "a step by the Michigan Legislature into a previously unregulated area; a step which furthers both the goals of FAFPA and others not prevented by FAFPA by taking an active role in enhancing the bargaining position of producers, protecting not only individuals, but also their associations from internal and external pressures." J.S. App. A14.

SUMMARY OF ARGUMENT

None of the three challenged aspects of the Michigan Act (the duty to bargain provision, the exclusive representation principle, and the service fee requirement) is preempted by the Federal Act. The Federal Act contains no explicit statement of preemptive intent, and Appellants concede that Congress did not intend to occupy the field of agricultural regulation, in which the states have historically enjoyed broad regulatory power.

The Federal Act states that it is not to be construed to change or modify existing state law. That provision is

important because the California statute which this Court upheld in *Parker v. Brown*, 317 U.S. 341 (1943), remained in effect at the time the Federal Act became law. Because that California statute contains aspects of compulsion comparable to those challenged in the Michigan Act it is apparent that Congress, rather than impliedly preempting the Michigan Act, explicitly declared that such a statute was not affected.

Since both the Federal and Michigan Acts protect a producer's right not to join an association of producers there is no conflict between the statutes on this point. Under the Michigan Act all bargaining unit producers pay their fair share of the costs of the bargaining association which represents them. Appellants contend that such a provision necessarily coerces a non-association producer to join the association. That contention is not supported by the authority upon which Appellants rely, and is inconsistent with the frequent recognition by state legislatures of a meaningful difference between compulsory membership in, and compulsory financial support of, a bargaining association.

Should this Court nevertheless conclude that the Michigan Act's exclusive representation and service fee provision automatically coerces producers to join or contract with producer associations, that coercion would not constitute the private handler action proscribed by the Federal Act. Rather, that challenged conduct, because it is both compelled and enforced by state action, is beyond the reach of the Federal Act.

In passing the Federal Act Congress' predominant purpose was to outlaw processor discrimination against those producers who attempted to organize for collective strength in their dealings with processors. The Federal Act was

moderate in scope and was never intended to *require* collective bargaining between processors and producer associations. Nevertheless, processor lobbyists feared that the Federal Act might be interpreted as a Wagner Act for agriculture and it was only because of those fears that Congress inserted a disclaimer section stating that the Act itself did not require such bargaining. Congress did not, however, affirmatively create or protect a processor right to ignore producer associations. To conclude otherwise, as Appellants have done, makes a mockery of the Federal Act by transforming it from a farmer's shield against discriminatory processors into a processor's sword to be used to destroy the collective action by farmers which Congress has historically fostered.

ARGUMENT

I. The Deferential Treatment Which This Court Has Accorded State Regulation of Agriculture Undercuts Appellants' Claim of Implied Preemption.

Appellants' preemption claim is exceedingly narrow because several branches of preemption analysis are clearly inapplicable. Appellants concede that the Federal Act has not "occupied the field" of agricultural marketing and bargaining. That conclusion is made abundantly clear by the second paragraph of 7 U.S.C. § 2305(d), which provides that "The provisions of this chapter shall not be construed to change or modify existing State law nor to deprive the proper State courts of jurisdiction."

It has long been recognized that a state law is preempted to the extent that it conflicts with a federal law. Such a conflict may arise when compliance with both federal and state regulations is a physical impossibility, or

where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. In the present case no such conflict exists. The Federal Act contains no explicit preemptive language, nor have Appellants pointed to any language therein which prohibits, in terms, any aspect of the regulation imposed by the Michigan Act. Indeed, Appellants' central argument is that the Michigan Act destroys the Federal Act's protection of an individual farmer's right not to join a cooperative, yet the Michigan Act itself explicitly recognizes that right. Mich. Comp. Laws § 290.704(1)(a). Consequently, this case is readily distinguishable from the kind of preemption case in which the federal intention to preempt is explicit, such as was the case in the first preemption case Appellants cite, *Fidelity Federal Savings and Loan Association v. de la Cuesta,* 458 U.S. 141 (1982), wherein the federal due-on-sale regulation explicitly provided, in relevant part, that "federal associations shall not be bound by or subject to any conflicting state law which imposes different . . . due-on-sale requirements." In stark contrast, nothing in the Federal Act declares that a state law is preempted merely because it is "different" from the Federal Act. On the contrary, the above-referenced language in 7 U.S.C. § 2305(d) plainly reveals the absence of a broad Congressional intent to preempt.

What standard, then, must Appellants satisfy in order to establish "implied" preemption? In *Kelly v. Washington,* 302 U.S. 1 (1937), this Court stated: "The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'." (Citations omitted).

Appellants have failed to make any effort to reconcile the Federal and Michigan Acts, whose purposes are the same (albeit the Michigan Act regulates more extensively), and they have also failed to recognize that the stringent preemption standard just discussed is particularly appropriate in the field of agriculture since this Court has recognized that "the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern." *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963).

Appellants assert that the Michigan Act differs from the objectives of Congress as expressed in the Federal Act, and that is is physically impossible to comply with both acts. *Paul, supra*, teaches that the first of those two assertions (even if true, a proposition we deny) is invalid since the difference "poses, rather than disposes of the problem before us" and the test "is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." 373 U.S. at 141-142.

As to Appellants' second assertion, *Paul* reveals the error in the effort of Appellants, and the amici supporting them, to use Congressional hearing testimony (including that offered by food processors opposed to the proposed Federal Act) to demonstrate the impossibility of physical compliance with both statutes. Thus, *Paul* observed that "a holding of federal exclusion of state law is inescapable and *requires no inquiry into Congressional design* where compliance with both federal and state regulations is a physical impossibility . . . ." 373 U.S. at 142-43 (emphasis added). If Appellants were correct in their assertion that it is physically impossible to comply with both statutes, that would be discernible from a reading of the two statutes.

Because of the above-noted absence of any claim (or basis for a claim) that Congress meant, in the Federal Act, to completely occupy the field of agricultural marketing and bargaining, much of the additional inquiry undertaken in *Paul*, i.e., whether Congress had (even absent a plain conflict between the two statutes there considered) ordained that the state regulation shall yield, is not pertinent herein.

On the other hand, it appears that the four justices who dissented in *Paul* saw the challenged California law as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress because of the comprehensive and pervasive scheme of the federal law there considered, as contrasted with the extremely limited regulation expressed in the Federal Act at issue herein. Thus Justice White observed in dissent:

> We would hesitate to strike down the California statute if the state regulation touched a phase of the subject matter not reached by the federal law and a claim were nevertheless made that such complementary state regulation is preempted, compare *Campbell v. Hussey*, 368 U.S. 297, with *Savage v. Jones*, 225 U.S. 501. But here the Secretary has promulgated a comprehensive and pervasive regulatory scheme for determining the quality and maturity of Florida avocados, ... 373 U.S. at 166.

Justice White went on to note that such pervasive regulation contrasted with that in *Parker v. Brown*, 317 U.S. 341 (1943), in which "the federal agricultural regulatory scheme was partial and incomplete" and the state statute was therefore not preempted. 373 U.S. at 168.

We submit that because the Federal Act's regulation is even more limited and incomplete than that of the

Agricultural Marketing Agreement Act discussed in *Parker*, it follows that the Michigan Act cannot be preempted on the ground of "pervasive federal regulation" as discussed in the *Paul* dissent.

II. There Is No Preemption Because the Federal Act Does Not Affect "Existing State Law," and a California Statute Containing Aspects of Compulsion Analogous to Those Challenged in the Michigan Act Was "Existing" in 1968.

The California Agricultural Prorate Act upheld as not preempted in *Parker* continues in effect today in essentially unchanged form (though bearing a different title) and was also in effect in 1968. As such it was "existing State law" which the Congress in the Federal Act expressly declined to "change or modify." 7 U.S.C. § 2304(d).

If that California statute, manifestly not preempted by the Federal Act, contains elements similar to those "compulsory" aspects of the Michigan Act challenged by Appellants herein, then it cannot reasonably be argued that Congress meant to deprive Michigan of its inherent right to utilize similar compulsion in its effort to remedy a serious problem facing Michigan farmers. Appellants' contrary argument gives far too little weight to the delicate issues of federalism implicated by any "implied" preemption case. As this Court observed in *Schwartz v. Texas*, 344 U.S. 199, 202-203 (1952), the exercise of federal supremacy is not lightly to be presumed.

The California Agricultural Prorate Act was passed in 1933 and, as in the instant case, its constitutionality under the state and federal constitutions had been upheld by the California Supreme Court prior to this Court's consideration of the case. 317 U.S. at 344 n.1. The same general statute remained on the books 35 years later when

Congress passed the Federal Act in 1968 and it remains in effect today.[1] That statute declares the California public policy "to aid agricultural producers in preventing or correcting adverse marketing conditions . . . [and] developing more orderly or efficient or equitable methods in the marketing of commodities and thereby to aid agricultural producers to achieve and maintain a purchasing power at an equitable and reasonable level".[2]

To carry out that policy the California statute authorizes a system of establishing marketing programs which, when implemented, are binding even upon those producers who might prefer not to be compelled to market their produce through such a marketing program. While the Solicitor General has suggested that such a marketing program is distinguishable from the Michigan Act's regulation on the ground that the former involves "direct state control of prices" (Solicitor General Br. 9 n.4), that suggestion does not withstand analysis because an essential aspect of both the California and Michigan statutes is the necessity for private producer initiative of, and

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1. That statute, Cal. Food & Agric. Code §§ 59301-60015 (1967), is now entitled The Agricultural Producers Marketing Law.

We recognize that in addition to state marketing laws there are also federal marketing orders pursuant to federal law. While it might be argued that the existence of such federal marketing regulation somehow minimizes the significance of Congress' declaration that such existing state marketing (and other) laws were unaffected by the 1968 passage of the Federal Fair Practices Act, such an argument misses the point. The compulsory aspects of the California marketing law could not logically have been unaffected by the Federal Fair Practices Act if, as Appellants have argued, Congress meant in that Act to assure that each farmer would enjoy the absolute right to decide to whom, and at what price, he would dispose of his raw product. Nothing in the language or history of the Federal Fair Practices Act suggests that a state's right to regulate argricultural bargaining relationships is dependent on the existence of parallel federal bargaining legislation.

2. *Id.* §§ 59541-59542.

majority producer support for, the collective marketing and/or bargaining.

State compulsion is not absent merely because private parties play an essential role in proposing and approving mandatory state action. As the Court noted in *United States v. Southern Motor Carriers Rate Conference*, 702 F.2d 532, 536 n.6 (5th Cir. 1983): "In *Parker* and *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1979), the Supreme Court made it clear that an action may be compelled by the state even though private parties petitioned the state to consider requiring such [mandatory state] action."

Exclusive agency bargaining under the Michigan Act can occur only after producers themselves seek the establishment of a bargaining unit (to be established, if at all, after a hearing and in accordance with state-mandated procedural and substantive standards) and after a majority of affected producers (producing a majority of the relevant commodity) elects to market their produce through the collective strength of a single bargainer. Mich. Comp. Laws §§ 290.706-707. Similarly, under the California statute a marketing program binding on all producers in the proration zone (analogous to a Michigan bargaining unit) can be implemented only after private producers (not the state) petition for the establishment of such a zone and marketing program, and only after a majority of producers assents to the marketing program.[3]

Under the California statute a state official appoints the individual producers who comprise the marketing program committee, but such appointments must come from nominations made by the producers themselves.[4]

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3. *Id.* §§ 59641-59655, 59855.

4. *Id.* §§ 59721-59723.

Just as the Michigan Act provides a mechanism by which affected producers may terminate the exclusive agency bargaining[5] the California Act also provides a mechanism by which producers can terminate the marketing program which, unless terminated, is binding even on the "unwilling" producers.[6]

Under the California Act a marketing program committee may be empowered to receive from all producers in the proration zone portions of such producers' commodity, to be delivered into a stabilization or surplus pool. Significantly, that marketing program committee can both affix "servicing charges to be assessed against the total quantity of any commodity which is received into the pools" and also market the contents of the stabilization pool at whatever price it deems advisable "consistent with the maintenance of stabilized marketing conditions."[7]

In each of these respects it appears that the California statute, "existing" in 1968, is essentially the same as the statute this Court found not preempted in *Parker*, 317 U.S. at 346-349. Moreover, the challenged aspects of the Michigan Act are fundamentally the same, at least for purposes of preemption analysis, as those in the California statute. Nothing in the California statute would prevent the members of a cooperative association from constituting the producer majority necessary to establish a marketing program. Indeed, where so authorized in writing by its members a cooperative association can assent on their behalf to a proposed marketing program.[8]

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5. Mich. Comp. Laws § 290.712.
6. Cal. Food & Agric. Code §§ 59301-60015 (1967).
7. *Id.* § 59806.
8. *Id.* § 59852.

Under the California statute even non-assenting producers are bound by the marketing program committee's judgment as to the "correct" price to be received for the marketed commodity. In one sense the California statutory system is even more "compulsory" than the practice under the Michigan Act since typically the association accredited under the latter statute has negotiated a base price only, and Michigan producers, whether or not MACMA members, normally choose the processors with whom they will negotiate, individually, the price (above the association negotiated minimum) and terms mutually acceptable to them and their processors. See reporter's trial transcript (hereinafter "RT") 88-89.

Finally, the California statute contemplates that all producers in a proration zone will be assessed service charges or fees proportional to their volume of production,[9] a concept obviously grounded upon the same fair-share concept which underlies the Michigan Act's service fee requirement. Mich. Comp. Laws § 290.710(1). The voluntary members of a particular California cooperative might control a marketing program committee, but such committee's assessment of charges or fees upon all producers who benefit would not contravene the Federal Act's protection, in 7 U.S.C. § 2303(a), of a non-assenting producer's right not to join an association. Again, this is so because 7 U.S.C. § 2305(d) states that no provision of that Act is to be "construed to change or modify existing State law."

Parker left no doubt as to the compulsory nature of the California regulatory scheme since this Court there observed that it was a misdemeanor "for any producer to sell . . . without proper authority any commodity for

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9. *Id.* §§ 59813-59818.

which a proration program has been instituted." 317 U.S. at 347. Just as 7 U.S.C. § 2305(d) contemplates continued state regulation of agricultural marketing and bargaining, this Court found in *Parker* that the Agricultural Marketing Agreement Act contemplated continued state regulation not inconsistent with the Federal Act. 317 U.S. at 354.

After noting in *Parker* that "[t]he only suggested possibility of conflict is between the declared purposes of the two Acts," this Court found significant the federal Agriculture Secretary's belief "that the state will tend to effectuate the policies of the federal act", as evidenced by the Secretary's approval of the state program reflected by a loan agreement between the state and the Commodity Credit Corporation. 317 U.S. at 358. Similarly, in the present case the Administrator of the Farmer Cooperative Service of the U.S. Department of Agriculture ("USDA") established the lack of any conflict between the two Acts. He explained that prior to his trial testimony he sent a copy of the Appellants' September 6, 1977 trial brief (which raises the same federal preemption arguments presently asserted to this Court) for review and study by the office of General Counsel in the USDA. He further testified that as a result of that study he was informed that the Department was "very unlikely" to seek to prevent the operation of the Michigan Act and that there was "no appearance of conflict between [the state and federal] statutes". Jt. App. 8-11.

Because 7 U.S.C. § 2305(b) places substantial authority for enforcing the Federal Act in the USDA, such testimony, supplemented by the fact that neither that Department nor anyone else has ever pursued any claim that a Michigan association's bargaining pursuant to the Michigan Act automatically violates the Federal Act, demonstrates an inherent weakness in Appellants' preemption claim.

Even if this Court rejects our comparison between the Michigan Act and the 1967 California statute expressly unchanged by the Federal Act, a careful review of Appellants' specific preemption claims demonstrates that they are fatally flawed.

III. Both the Federal Act and the Michigan Act Protect Against Handler Coercion Concerning a Farmer's Right Not to Join an Association.

Section 2303(a) of the Federal Act makes it unlawful for a handler "To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers, . . ." Likewise, the Michigan Act makes it unlawful for a handler to "coerce a producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association. . . ." Mich. Comp. Laws § 290.704(1)(a). The Federal Act, but not the Michigan Act, defines the term "handler" so as to include an association. The fact remains, however, that both statutes clearly protect a farmer's right to join or refrain from joining a producer association. Notwithstanding both statutes' protection of this right, Appellants argue that the service fee and exclusive representation features of the Michigan Act "completely destroy" the farmer's federal right not to join an association. They assert that because under the Michigan Act even non-association farmers, when dealing individually with handlers, (1) are bound by the terms negotiated by the accredited association and the handler, and (2) must pay a service fee to such association, then such farmers are somehow being unlawfully coerced by the association to join the association. That assertion is based upon Appellants' dual contentions that there is no meaningful distinction (in the somewhat analogous field of

labor law) between an agency shop and a union shop, and that a state action analysis cannot save the Michigan Act from the asserted violation of the Federal Act's protection against coercion of a farmer's right not to join. The Michigan Supreme Court correctly rejected both of those contentions.

At the outset it should be noted that if Appellants were correct in asserting that a service fee requirement in an exclusive representation system automatically violates a statutory protection of an individual's right not to join an association, then it would follow that the Michigan Act itself suffers from a major internal inconsistency. That is, if the Michigan Act's majority rule principle means that non-association farmers will necessarily be coerced into joining associations such as MACMA, then it follows that whenever an association is accredited pursuant to the Michigan Act a violation of that same Act's protection of a farmer's right to refrain from joining will automatically occur. Mich. Comp. Laws §§ 290.704(1)(a), .710(1).

Fundamental principles of statutory interpretation require that a statute be read as a whole, and that the interpretation to be given to one section arrived at only after due consideration of every other section so as to produce, if possible, a harmonious and consistent statute. Similarly, where a statute is arguably subject to conflicting interpretations, one which would result in the Act being held unconstitutional and the other permitting a finding that it is constitutionally sound, the latter alternative should be accepted. *See, e.g., Aero Mayflower Transit Co. v. Board of Railroad Commissioners*, 332 U.S. 495, 500 n.10 (1947).

If a statutory service fee requirement imposed on non-association bargaining unit members automatically violated an individual's statutory right not to join an asso-

ciation, there would be no point in a legislature's writing both provisions into the same statute since the service fee requirement would obviously be invalid. Legislatures do write both types of provisions in a single statute, however, and courts do not, on review of such statutes, strike them down as internally inconsistent.

In *Knight v. Minnesota Community College Faculty Association*, 51 U.S.L.W. 3703 (Mar. 29, 1983), this Court summarily affirmed that aspect of a three judge federal court decision which upheld the service fee requirement (challenged as unconstitutional) in such a statute. This Court has not infrequently avoided the adjudication of constitutional issues where such avoidance could be accomplished by giving a statute a narrowing construction. See, e.g., *International Association of Machinists v. Street*, 367 U.S. 740 (1961). That familiar approach, however, seems inappropriate where it requires a court to treat as identical two concepts which a legislature clearly considered different.

In this regard it is significant that, in deciding the *Knight* case, the three judge federal court expressly recognized that the challenged Minnesota statute specifically protected an individual's right not to join a bargaining association even though that individual was required to financially support that association in the same manner as the analogous bargaining unit member under the Michigan Act. In its findings of fact in *Knight* the court observed, in its discussion of the structure of the statute challenged, that "public employees under PELRA have a right not to join any labor organization which may be certified as their exclusive representative, but a 'fair share fee' may be deducted from nonmembers and paid to the representative. Minn. Stat. § 179.65, Subd. 2." 111 LRRM 3156, 3164 (Minn. 3 Judge DC 1983).

We cite *Knight* not for its holding but rather because of the recognition, implicit in the challenged statute, that a meaningful right not to join a union is not inconsistent with a state-approved requirement that those who benefit must share the cost of collective bargaining. The latter requirement does not coerce one to give up the former right. Other statutes similarly authorize a requirement that an individual financially support a bargaining association even though that individual may not be required to join that association.[10] In view of the recognition that such provisions are not inherently in conflict it would seem that Appellants, in order to meet their heavy burden of proving implied federal preemption, must demonstrate compelling authority in support of their position. Instead, they rely on (1) a misreading of this Court's decision in *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), and (2) the false premise that an agency shop is necessarily invalid unless it is expressly authorized by federal law.

Appellants and the Solicitor General rely on that portion of the *General Motors* case which observed, in a very limited context, that an individual's position in an agency shop is "the practical equivalent of union 'membership' ". 373 U.S. at 743.

The first point to recognize about the *General Motors* case is that it presented this Court with a justiciable controversy *only* because the State of Indiana had judicially determined (in *Meade Electric Co. v. Hagberg*, 129 Ind. App. 631, 159 N.E.2d 408 (1959)) that an agency shop clause

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10. See, e.g., Conn. Gen. Stat. § 5-280(a) (1975) as amended; Haw. Rev. Stat. § 89.4(a) (1976) as amended; Mont. Code Ann. § 39-31-401(3) (1983); Ohio Rev. Code § 4117.09(c) (effective 1984); Or. Rev. Stat. § 243.650(10) (1981); R.I. Gen. Laws ch 178 § 36-11-2 (1958) (as amended); Vt. Stat. Ann. Tit. 21, § 1722(1) (1978).

did *not* violate that state's right-to-work law.[11] Such a determination was *not* upset by this Court but rather provided the reason why this Court was called upon to decide whether the Taft-Hartley amendments to the Wagner Act permitted the negotiation of *agency* shop agreements even though the pertinent provision of such amendments authorized union-employer agreements compelling union "*membership* as a condition of employment. The Court answered that question affirmatively.

While Appellants argue that "agency shops have been allowed in the labor law context because such arrangements are *specifically authorized* by federal law" (Brief of Appellants 24) they immediately follow that assertion by quoting the Wagner Act's authorization of an agreement requiring *membership* (not mere financial support by nonmembers) in a labor organization as a condition of employment. In *General Motors* this Court explained that the "prevailing administrative and judicial view under the Wagner Act was or came to be that the proviso to § 8(3) covered both the closed and union shop, as well as less onerous union-security arrangements if they were otherwise legal." 373 U.S. at 739.

In discussing the enactment of the Taft-Hartley Act this Court described Congress' addition of certain language to the original Wagner Act proviso to § 8(3) and explained that such language accomplished the "twin purposes" of eliminating, through the abolition of the closed shop, "the most serious abuses of compulsory unionism," while at the same time recognizing that in the absence of a union

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11. The Indiana law declared the state's policy, in relevant part, "that membership or nonmembership in a labor organization should not be made a condition to the right to work or to become an employee of or to continue in the employment of any employer." 129 Ind. App. 631, 159 N.E.2d at 411.

security provision many employees who benefit from union-achieved benefits would refuse to pay their share of the cost of same. 373 U.S. at 740.

By reading the Wagner Act and Taft-Hartley Act provisos, which expressly authorize a requirement of union *membership*, as also implicitly authorizing the less burdensome *agency* shop this Court did not equate these different union security devices for all purposes. Rather, this Court reasoned that if Congress was willing to tolerate the more onerous requirement of actual union membership it was also willing to tolerate the less onerous requirement of union financial support without a formal membership requirement. This Court stated that the "difference between the union and agency shop may be of great importance in some contexts, but for present purposes it is more formal than real. To the extent that it has any significance at all it serves, rather than violates, the desire of Congress to reduce the evils of compulsory unionism while allowing financial support for the bargaining agent." 373 U.S. at 744.

In addition, nothing in *General Motors* supports Appellants' belief that an agency shop is inherently invalid absent specific federal statutory approval. In discussing the Wagner Act proviso to § 8(3)'s rule, which "forbade employers to discriminate against employees to join a union," this Court explained that the proviso (which permitted negotiated agreements compelling union membership) was added not because of Congress' certainty that a membership requirement would automatically constitute such forbidden discrimination but rather because it was merely "feared" that absent the proviso the anti-discrimination provision "*might* be held to outlaw union-security arrangements such as the closed shop, see 79 Cong. Rec.

7570 (Statement of Senator Wagner), . . ." 373 U.S. at 738-39 (emphasis added).

The proviso was not viewed as critical to the survival of union security agreements. Rather, as explained by the House Committee on Labor, it was added to avoid potential disagreement: "All that it does is to eliminate the doubts and misconstructions in regard to the effects of section 7(a) upon closed-union agreements, ..." H.R. Rep. 1147, 74th Cong., 1st Sess. 19 (1935).

This Court has observed that the union and agency shop are not identical and that the difference between them "may be of great importance in some contexts." *Abood v. Detroit Board of Education*, 431 U.S. 209, 217 n.10 (1977), quoting *General Motors*, 373 U.S. at 744. In *Abood* this Court explicitly recognized that a union shop arrangement imposes a requirement over and above that imposed by an agency shop agreement, i.e., the "additional requirement that each employee formally join the union," a requirement which this Court did not have to consider in that case.

The Michigan Supreme Court agreed with Appellees that there is a "meaningful distinction between being required to *join* an association and merely being required to support and be represented by an association as required by AMABA." J.S. App. A10 n.13. Nothing in the Federal Act purports to outlaw a state's regulation, serving the same general purpose as the Federal Act, merely because the state provides additional tools to make the prohibition of processor discrimination against association membership meaningful. Accordingly, in this context the requirement of association financial support does not constitute association coercion in violation of a producer's right not to join an association.

After recognizing that the Michigan Act does not compel producers to actually become members of an accredited association, the Solicitor General suggests that this does not save the Michigan Act since, in any event, 7 U.S.C. § 2303(c) prohibits an association (because included within the definition of federal handler) from coercing or intimidating any producer to enter into a membership or marketing contract with an association of producers. Solicitor General Br. 21-22. Yet nothing in the Michigan Act's exclusive representation provision requires a non-association producer to enter into a membership agreement or marketing contract with the accredited association. Rather it is only by operation of law, not by *contract*, that the accredited association becomes the non-association producer's bargaining representative with respect to those terms over which the association chooses to negotiate on behalf of all bargaining unit members. Moreover, associations by themselves cannot seek accreditation under the Michigan Act because no association can *compel* the membership of a majority of bargaining unit members. On the contrary, it is only by combining the numerous individual decisions of a majority of farmers, who have entered into marketing and bargaining contracts with a single association, that such an association is authorized to apply for accreditation. Mich. Comp. Laws §§ 290.706-707. In this sense the Michigan Act's exclusive representation principle cannot be implemented by mere association desire but rather only as a result of the voluntary decisions of a majority of individual farmers. Even if such a democratic system could fairly be characterized as coercive, a proposition we reject, it does not constitute handler (in this case, association) coercion and is therefore beyond the reach of the Federal Act.

IV. The Michigan Act Is Valid Because the Challenged Conduct Is Compelled and Enforced by State Action Rather Than by the Private Handler Action Proscribed by the Federal Act.

Should this Court find that the Michigan Act's provision for exclusive representation and a service fee automatically coerces producers to join or contract with producer associations, such coercion would be coercion by the state, not the coercion by *handlers* prohibited by 7 U.S.C. §§ 2303(a) and (c). Such was the holding of the Michigan Supreme Court. J.S. App. A10.

Appellants and the amici supporting them attempt to overcome that holding by offering distinctions between the instant case and the state action doctrine developed in *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny. The offered distinctions fail and, as we discussed above, *Parker's* facts demonstrate that the state agriculture statute unsuccessfully challenged in that case was far more comparable to the Michigan Act than to the numerous other factual settings in which *Parker* has been applied. Because most *Parker* applications occur in the antitrust area that case is generally viewed only in terms of antitrust immunity. However, a careful reading of *Parker* reveals that it applied fundamental preemption principles that also apply herein. Thus this Court observed that "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 350.

Notwithstanding the breadth of the language in the Sherman Act this Court, in *Parker*, found "no hint that it was intended to restrain state action or official action

directed by a state." 317 U.S. at 351. The instant case is even more compelling than *Parker* on this point since 7 U.S.C. § 2303(a) prohibits only *handler* coercion in the exercise of an individual's right to join or not join a producer association. In *Parker*, as in the instant case, the state statute was not enacted as an unreasonable price-fixing scheme for producers. Rather, as this Court noted in *Parker*, the California statute required a showing that the particular marketing plan "will prevent agricultural waste and conserve agricultural wealth of the state without permitting unreasonable profit to producers." 317 U.S. at 346.

Appellants ignore the striking factual similarity between the state economic regulation involved in the Michigan Act and in the California statute upheld in *Parker*. They quickly turn their attention from *Parker's* own facts to the more recent application of the *Parker* doctrine in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). After stating *Midcal's* two-step test for defining protected state action they *assume* "that the majority rule provisions of the Michigan Act reflect an articulated state policy," thus satisfying the first step, but they assert "that the policy is not supervised by the state in any way" and therefore conclude that the Michigan Act fails to satisfy the requisite second step. Brief of Appellants 28.

It is clear that the Michigan Act's exclusive representation system, including its service fee requirement, is mandated any time an association is accredited and thus could not be more clearly articulated and affirmatively expressed in state policy. Mich. Comp. Laws § 290.710(1). It is also clear that the State of Michigan actively supervises the enforcement of these exclusive representation and service fee provisions. The Michigan Act makes it an

unfair practice for a Michigan handler "to conspire, combine, agree or arrange with another person to do or aid or abet the doing of any practice which is in violation of this act." Mich. Comp. Laws § 290.704(1)(f). Accordingly, when a handler failed to pay certain producers at least the negotiated minimum price for their apples, the association filed unfair practice charges against that handler. Following a formal administrative hearing before Appellee Michigan Agricultural Marketing and Bargaining Board that Board issued an appropriate order requiring the handler to pay the affected producers the minimum price negotiated by the association and to pay the association the service fees to which it was entitled. *See* RT 251-252, 259-261.

In view of the foregoing the Michigan Supreme Court correctly held that any possible coercion (which coercion that Court did not find) is state action rather than the handler coercion proscribed in 7 U.S.C. §§ 2303(a) and (c). J.S. App. A10 and n.13. Accordingly there is no preemption.

Appellants rely on *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), in support of their attempt to avoid the immunity from preemption created by *Parker v. Brown*. In the Michigan Supreme Court Appellants attempted to rely on a similar Michigan decision, *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.*, 334 Mich. 109, 54 N.W.2d 268 (1952), which held that the application of state fair trade legislation to non-signers was unconstitutional.

The Michigan Supreme Court found Appellants' reliance on *Shakespeare* flawed by their false premise that the Michigan Act was directed toward achieving price security for producers at the expense of the operation of

a healthy free market. J.S. App. A20-21. The Michigan Supreme Court correctly concluded that the Michigan Act:

> was not directed toward achieving price security for producers at the expense of the operation of a free market, but was, instead, only intended to overcome an artificial obstacle to the operation of supply and demand forces, *viz.*, the fortuitous position of handlers of perishable agricultural products in the chain of marketing such commodities which permitted handlers to distort free market forces by demanding prices not wholly reflective of supply and demand. J.S. App. A21.

Appellants' comparison of the Michigan Act's regulation with that of the fair trade laws struck down by *Schwegmann* and *Shakespeare* ignores striking differences between the two statutory systems. The fair trade laws could authorize a *single* retail signer to bind all non-signer retailers, against their will, to the signer's agreement with the manufacturer not to sell the designated product below the minimum price agreed to. In contrast, neither the Michigan Act nor the California statute upheld in *Parker v. Brown* authorizes the binding of non-assenting producers unless a *majority* of affected producers initiates the regulation and unless the state specifically approves, by reference to statutory standards, the segment of the agricultural economy ("proration zones" in California, "bargaining units" in Michigan) so regulated.

Rather than discouraging competition, by allowing a single signer to bind far more numerous non-signers, as did the state fair trade laws, the Michigan Act was intended to correct a disparity of bargaining power so that meaningful, competitive negotiations could occur.

The Solicitor General also analogizes to *Schwegmann* and says that the present case poses the question "whether

the private conduct demanded by the Michigan Act is forbidden by the AFPA, rather than by the Sherman Act." Solicitor General Br. 19-20. In arguing that one of the reasons the Federal Act protected voluntary association membership was to avoid frustrating the policies of the Sherman Act, the Solicitor General cites Note, *Trust Busting Down on the Farm: Narrowing the Scope of the Antitrust Exemptions for Agricultural Cooperatives*, 61 Va. L. Rev. 341 (1975). A review of that note reveals that notwithstanding its author's general view that agricultural cooperatives enjoy overbroad protection from the antitrust laws, the author recognized that a major problem faced farmers who must sell to powerful food processors:

> One major problem farmers faced in 1922 which remains equally serious today is concentration in the market for their products. Capper-Volstead's authorization of collective processing and marketing was an attempt to counter the bargaining power of oligopsonist buyers, but the bargaining power gap is as wide today as it was fifty years ago. *Id.* at 364.

After explaining that deconcentration of the food processing industry was not, as of 1975, "on the horizon" the author explained:

> Congress attempted relief with the passage of the Agricultural Fair Practices Act of 1967. This legislation forbids to large buyers certain practices designed to impair the producer's right to market his products through a cooperative, such as economic coercion and price discrimination. The Act also prohibits buyers from inducing farmers to cease or to refuse to belong to a cooperative by offering them valuable consideration.

> The Fair Practices Act was designed to prevent concentrated buyers from using their economic leverage to destroy collective marketing. But because the Act does not prohibit 'normal' good faith commercial intercourse between producers—independent or otherwise—and buyers, the cooperatives are handicapped in forming a united front against concentrated buyers. *Id.* at 366.

In a footnote at the end of the quoted text the author explained that "problems of proof [in attempting to enforce the Federal Act] are severe," noting that, of twenty actions brought under that Act, "Sixteen had been dismissed for lack of evidence or failure to state a claim. Three have been settled and one is in litigation." *Id.*

In passing the challenged Act the Michigan Legislature was apparently aware that the proof problems encountered under the Federal Act tended to frustrate its purpose of preventing concentrated buyers from using their economic leverage to destroy collective bargaining. The Michigan Supreme Court carefully considered the voluminous trial court record established to demonstrate the purpose and effect of the challenged statute and concluded that the Michigan Legislature's innovative solution[12] to a serious Michigan problem was valid. In rejecting the Appellants' argument that the Michigan Act went "too far" the Michigan Supreme Court noted various ways in which the Michigan Legislature, in an area beyond the Federal Act's regulation, could have correctly con-

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12. The Michigan Act is similar in key respects to the proposal suggested in Note, *Establishing Bargaining Units in Agricultural Marketing*, 68 Va. L. Rev. 1298 (1982), whose author contended that "Some innovation is clearly required to equalize the parties' bargaining power without vitiating the competitive forces." *Id.* at 1302.

cluded that the Michigan Act's challenged features were essential to serve the purposes shared by both statutes.

The Michigan Supreme Court found ample support in the record for the trial court's factual findings which "establish a disparity in bargaining power resulting in disruption of the orderly marketing of perishable agricultural commodities and the imposition of inequitable economic pressure upon independent producers." J.S. App. 822. Among those specific factual findings concerning the conditions which existed in Michigan prior to the Michigan Act are the following:

> a) Growers faced the problem of disposing of extremely perishable fruits and vegetables with a corresponding lack of freezing and/or storage facilities.
>
> b) There existed large numbers of unorganized growers who, when aligned against a concentration of processors, could not individually affect the price paid for their product by processors.
>
> c) The market lacked an extensive number of processors and the growers lacked ability to transport perishable goods any distance.
>
> d) Processors were reluctant to recognize voluntary grower cooperative bargaining associations.
>
> e) Processors were known by growers to discriminate against persons who belonged to cooperative bargaining associations. J.S. App. 821.

After reviewing the trial court record the Michigan Supreme Court was persuaded that the processor conduct described in this last finding caused the Michigan Legislature to step in and correct the problem which the Federal Act had not successfully solved. As stated by the Michigan Supreme Court:

> AMABA's exclusive representation provisions insulate the association from handler attacks on its membership by eliminating the possibility of 'sweetheart' offers made to non-association producers, but not the association's membership. Without doubt, if the purpose of a 'sweetheart' offer made to one producer is to coerce another in his choice of association membership, then the handler would be in violation of § 2303(a) of FAFPA. The obvious difficulty in proving such indirect coercion, especially since the justification for a superior offer may rest upon an array of ostensibly sound but often subjective economic factors such as a handler's assessment of quality, is eliminated under an exclusive representation system.
>
> Similarly, AMABA's service fee provisions protect the association's integrity by eliminating the incentive for a producer to be a 'free rider,' accepting the benefits of association representation without assisting in its costs. J.S. App. A15.

The quoted language reflects the Michigan Supreme Court's unanimous recognition that the Michigan Legislature concluded that the "compulsory" aspects of its Act were essential, in view of the ineffectiveness of the Federal Act, to the survival of Michigan agriculture. The Michigan Supreme Court explained that:

> The compulsory aspect of AMABA is secondary but very much germane to its primary permissive-enabling function in that exclusive representation is an additional safeguard to the majority wanting representation by association. In a very real sense requiring representation of the minority permits representation of the majority. J.S. App. A26.

This passage demonstrates the state's clear articulation and affirmative expression of support for the policy of exclusive representation. Moreover, Michigan is involved in the enforcement of its policy of promoting meaningful negotiations between roughly equal bargaining parties since it has established a formal mechanism for resolving violations of the Act and because its statutory standards for resolving disputed terms of trade are as reasonably precise as the subject matter permits. Mich. Comp. Laws §§ 290.704(3)-(6), .720. *Cf. City of Detroit v. Detroit Police Officers Association*, 408 Mich. 410, 458-466, 294 N.W.2d 68 (1980). Moreover, the Michigan Act remedies the central evil addressed by the Federal Act without violating the policies of the Sherman Act.

As contemplated by the Michigan Act the bargaining between the accredited association and various food processors will generally result in the negotiating parties reaching their own base price agreement by reference to supply and demand forces. In the rare case in which the parties do not reach a timely agreement the Michigan Act provides for arbitration of the unresolved contract terms, and the arbitration committee is required to base its decision on the eleven criteria set forth in the statute. Moreover, if a party to the arbitration believes that the arbitration committee's award fails to comport with those criteria then that party has a statutory right (which, to date, no one has found necessary to exercise) to seek review of the award in the Michigan Court of Appeals. Mich. Comp. Laws § 290.723. This is a far cry from the unilateral price-setting by wholesalers found unprotected by the state action shield in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

Appellants' preemption arguments fall far short of what is necessary in order to strip Michigan of its right to regulate so as to assure a viable and stable agricultural economy. The challenged regulation is justified, in part, by the same rationale which led this Court to conclude, in the labor context, that a state's interest in labor stability is strong enough to justify the enforcement of a statutorily authorized union security agreement notwithstanding the First Amendment. *See Abood, supra,* 431 U.S. 209.[13] In any event, because the Michigan Act compels the challenged exclusive representation and marketing service fee provisions it follows that the state action defense overcomes Appellants' claim of handler coercion.

V. Neither the Legislative History nor the Language of the Federal Act Supports the Claim That It Creates a Processor Right to Ignore Cooperative Associations of Producers.

Having addressed Appellants' argument that the Michican Act destroys the Federal Act's protection of a farmer's right not to join an association, we now turn to Appellants' assertion that Congress, through 7 U.S.C. § 2304, affirmatively created or protected a processor's right to deal individually with farmers and to ignore farmer cooperatives. After carefully examining Appellants' arguments the Michigan Supreme Court rejected them, concluding that "Section 2304's disclaimer of any Congressional intent to affect pre-existing freedom to deal individually cannot be read as a creation of new rights or an express new statu-

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13. Incidentally, the First Amendment issues of *Abood* are obviated because the Appellee bargaining board has promulgated a rule mandating that marketing service fees "shall not include costs of services to members that do not benefit nonmembers." 1979 Mich. Adm. Code 1391, R. 290.106.

tory protection of old rights; nor can it be read as precluding a state from choosing to adjust pre-existing freedom to deal." J.S. App. A14.

The asserted type of preemption, implied preemption, is not to be lightly presumed. Accordingly the normal cautions regarding the shortcomings of inquiry into legislative motive are particularly applicable. In this context, because of the rule against seeking out conflicts between state and federal regulation where none clearly exists, we submit that it is unproductive to attempt to ascertain the meaning of what Congress did by reference to what opponents of the legislation said during committee hearings.

This Court has observed that "inquiry into congressional motive or purposes are a hazardous matter," *United States v. O'Brien*, 391 U.S. 367, 383 (1968), in part because "[w]hat motivates one legislator to make a speech for a statute is not necessarily what motivates scores of others to enact it." *Id.* at 384. *See also Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 51 U.S.L.W. 4449, 4456 (1983).

In his concurring opinion in *Schwegmann, supra*, Justice Jackson expressed the following view on the use of legislative history as a basis for judicial decision-making:

> [I]t does not appear that there is either necessity or propriety in going back a bit into legislative history.
>
> Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. I cannot deny that I have sometimes offended against that rule. But to select casual state-

> ments from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress and one of its important functions. 341 U.S. at 395-396.

Justice Jackson went on to observe that "[t]o accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country." 341 U.S. at 396-397.

If the confusing purpose which Appellants attribute to Congress is accurate one must wonder why the U.S. Department of Agriculture, entrusted with substantial enforcement power under the Federal Act, has not found Appellants' strained meaning in the words of that Act. We have already referred to the undisputed trial testimony which demonstrated the USDA's view that the Michigan Act does not conflict with the Federal Act. *Supra* at 13. Similarly, in U.S. Dep't of Agriculture, *Legal Phases of Farmer Cooperatives* (1976 ed.), the publication of which is an official function of the USDA's Farmer Cooperative Service, the authors succinctly state as follows:

> The Agricultural Fair Practices Act of 1967 protects farmers' rights to organize and join cooperatives. The law establishes standards of fair practices for handlers and processors who deal with farmers. It prohibits them from discriminating against farmers because they are members of a producer's association. *Id.* at 544.

Nevertheless, the heavy reliance by Appellants and amici upon the Federal Act's legislative history warrants some discussion of same in order to place that history in proper perspective. As Senator Aiken, the sponsor of the bill ultimately passed by the Senate, predicted on

May 2, 1967, at the outset of a new segment of Senate subcommittee hearings on S. 109, the bill which he had earlier introduced in 1965:

> S. 109 would put teeth in existing law and those who presently make and control market prices will vigorously oppose it.
>
> They do not want the farmer to have a bargaining position. *Agricultural Producers Marketing Act: Hearings Before the Subcomm. of the Senate Comm. on Agriculture and Forestry*, 90th Cong., 1st Sess. 10 (1967) [hereinafter cited as May 1967 Senate hearings].

Senator Aiken's prediction proved accurate since, in addition to persons whose graphic descriptions of the processor coercion against cooperative membership demonstrated the obvious need for a more effective legal remedy, numerous other individuals testified against the bill.

While speaking in support of the proposed legislation Agriculture Secretary Freeman made the following observation:

> [I]f the expanded play of the market and private decision making is to work fairly and produce the best results for the entire Nation, the bargaining partners must be somewhat comparable in strength. That is not true today. Because he usually acts individually, the farmer has almost no strength at the bargaining table. It is only when the farmers act in concert that the bargaining process can function as intended in our free enterprise system. It is simply too much to expect a fair result to both parties and in the national interest when one party at the bargaining table is so much stronger than the other. May 1967 Senate Hearings 21-22.

Interestingly, Secretary Freeman also made reference to a Michigan study of discrimination by processors against those farmers who wanted to join the Great Lakes Cherry Producers Marketing Cooperative. *Id.* at 19-20. The processor discrimination faced by that cooperative was explored in more detail in the trial herein. See, e.g., R.T. 1007-1019 and Exs. D and E.

The testimony of present counsel for amicus National Food Processors Association identified the processors' fear that the bill was ambiguous enough that it might raise "a substantial question" as to whether "the bill restricts in any way the right of a handler to refuse to deal with a bargaining association." May 1967 Senate Hearings 85. Being assured by the bill's proponents that no such restriction was intended by *that* bill, the processors had no legitimate basis for continuing to fear that the bill might be interpreted as a Wagner Act for agriculture. Yet as the Michigan Supreme Court correctly observed, an explanation of what the Federal Act was not intended to do has no logical nexus with what a state may do in an area left unregulated by Congress. J.S. App. A8.

The statement of Michigan Senator Hart, a co-sponsor of the bill, advocating the right of farmers to organize themselves just as workers had done thirty years before, certainly flies in the face of any claim that Congress clearly intended the Federal Act to deprive states of the right to enact agricultural bargaining statutes. May 1967 Senate Hearings 98.

It is true, as Appellants have noted, that many proponents of the bill preferred its original language over that finally adopted by the Senate. That fact, however, merely demonstrates that the Federal Act, like other legislation, involved certain aspects of compromise. In this instance much of that compromise was based on the un-

founded fears of processor lobbyists as to what the original proposed legislation, which was never intended as a comprehensive bargaining statute, would have accomplished. After the Senate passed S. 109 it proceeded to the House of Representatives where it was referred to the Committee on Agriculture, which held hearings in September 1967. Some farmer representatives were troubled by certain of the Senate's language changes which might be read, notwithstanding the admitted lack of any evidence of any abuses by farmer associations *against* farmers, as protecting farmers from their own associations as well as from unfair practices by processors and other buyers. Other farmer representatives recognized, however, that the need for a viable remedy for processor discrimination was so strong as to warrant support of a bill which was a step in the right direction and which the Congress would enact, as distinguished from a "perfect" bill which Congress might not enact. As an example, M. R. Garstang, General Counsel of the National Milk Producers Federation, stated his preference for the original language in the bill, but he recognized that the bill passed by the Senate was a compromise and noted as follows:

> I believe most of the protections that were originally in it are still there. I think a lot of things are written into the Senate bill which aren't necessary and which are designed to lay at rest some ghosts which people were seeing. *Discrimination Against Members of Farmer Cooperatives: Hearings on S. 109 Before the Subcomm. of the Senate Comm. on Agricultural and Forestry*, 89th Cong., 2nd Sess. 87 (1966).

Near the end of the House Committee Hearing Congressman Foley asked present counsel for amicus National Food Processors Association whether he felt there was substantial evidence of intimidation compelling individual pro-

ducers to join producer organizations. The answer received was that there was no such evidence, either in the Senate or House hearings, although the witness noted that, "I did point out that there have been in the past instances of coercive action by associations." *Id.* at 141. The reference to the past instances of coercive association practices is apparently a reference to an earlier hearing before the Senate subcommittee held in September of 1966. There Edward Dunkelberger, in asking for language that would protect farmers in the exercise of their right not to join associations, referred to "numerous cases in which State and Federal courts have found that bargaining associations have engaged in coercion, fraud, and even physical violence or threats thereof to force producers to join the association or to refuse to deal with processors who will not deal with the association." *Id.* at 195. This testimony appears to be the only definition of the type of association coercion the Congress had in mind when it passed the Federal Act. Because the Michigan Act's exclusive representation and service fee requirements do not constitute such association coercion, fraud, or physical violence, the Federal Act does not preempt the Michigan Act.

Because of the witnesses' divergent views as to the need for, and effect of, federal legislation, further reference to the Senate and House hearings would be unwarranted and unhelpful. Keeping in mind Justice Jackson's caveat that "we should not go beyond committee reports" we turn now to a brief discussion of same. The Senate Committee Report, which recommended passage of the bill, makes reference to the limited function of the disclaimer section (7 U.S.C. § 2304) of the bill by noting, under the heading "Committee Consideration," that the amended bill "makes it clear that normal and proper dealings not designed to restrict the producer's freedom of choice *are not prohibited.*" S. Rep. 474, 90th Cong., *reprinted in* 1968

U.S. Code Cong. & Ad. News 1867, 1968 (emphasis added). As noted in Section 5 of the section-by-section explanation, 7 U.S.C. § 2304 "disclaims any intent to prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in an association of producers, or to prevent handlers and producers from dealing with one another individually on a direct basis, or to require a handler to deal with an association of producers." *Id.* at 1873. The Senate Committee explained that "the bill does not prevent or require these actions and is not intended to do so," yet "while the proponents of the bill stated in their testimony that this was not their purpose, there was some concern, especially on the part of processors and other purchasers of agricultural products, that the bill in fact went further than intended." *Id.* Thus, while the committee put to rest processors' fears, however unfounded, that the Act was a "duty to bargain" law, the committee also concluded its discussion of the disclaimer section by stating:

> While the bill does not require a handler to deal with an association of producers, it certainly makes clear that farmers have a right to form such associations and should be protected in the exercise of this right. *The fact is clear that an association of producers which has obtained the voluntary membership of a large number of farmers deserves respect and recognition by the handler of agricultural products.* *Id.* (emphasis added).

Amazingly, amicus National Food Processors Association, notwithstanding the efforts of its predecessor, the National Canners Association, to make it clear that the Act did not *create* a "duty to bargain," now dramatically expands the effect of such efforts and contends that this section created an affirmative processor right to refuse to

bargain with producer associations and also deprived states of their inherent right to regulate agriculture. Moreover, it contends that no farmer can decide whether to join a producer association without running the substantial risk of forcing that farmer's regular buyer to look elsewhere for raw products. Brief for National Food Processors Association 24-25. It is hard to imagine a conclusion more in conflict with the Senate Report's final sentence concerning the Section 2304 disclaimer, quoted above, which recognizes the clear fact that an association of producers "deserves respect and recognition by" such processors.

The Senate Committee Report notes that it "did not have before it any testimony to indicate that producers were being subjected to any improper pressure to join associations," and explained that it was only because of the "logic of the situation that if the objective is to protect the producer and afford him a free choice, the bill should protect him from pressure in either direction." *Id.* at 1871. Because no responsible association could condone fraud or violence to coerce independent farmers to join producer associations, the Federal Act's prohibition of this narrow aspect of handler discrimination is understandable. To equate that concept with a clear Congressional deprivation of a state's right to regulate agricultural bargaining, however, is to turn the Federal Act on its head.

Contrary to Appellants' suggestion that the original bill's objectives were not carried out by the final legislative product, the House Committee Report, prepared after the Senate passed S. 109, states in pertinent part that "This legislation is necessary in order to give farmers and their marketing associations new and greater 'market power' " and "Our whole food supply will be endangered if we do not restore to agriculture prices which will enable farmers to stay in business and produce abundantly." H.R.

Rep. 824, 90th Cong., 1st Sess. 1-2 (1967). In its summary of the bill the report states that Section 2305 "makes clear that existing State law is unaffected by this legislation." *Id.* at 3. Under the heading "Committee Action" the committee explained as follows:

> The longstanding policy of the committee and the Congress to promote and support the growth and strength of farmer cooperatives was manifested by the deletion from the Senate bill of the language which many witnesses felt might encourage farmers "not to join" cooperatives. *Id.* at 3.

The House Committee explained that its "amendments to S. 109 were designed to give producers and their associations a more favorable position than that which they held under the bill as it passed the Senate. . . ." *Id.* at 5. Perhaps most effectively disposing of Appellants' assertion that Section 2304, the disclaimer section, creates rights, the House Committee Report noted the importance to processors of clarification that the Federal Act itself did not create a *duty* on the part of processors to bargain. The Committee explained that it was "cognizant of the importance of this section to handlers and felt that *since the scope of the bill embraced only the prohibited acts* in [Section 2303], the language of [Section 2304] should remain substantially as it was approved by the Senate." *Id.* (emphasis added).

Thus, the statutory language and its history plainly reveal that 7 U.S.C. § 2304 is nothing more than an explanation of what the statute does *not* do. Appellants' contrary argument is even weaker than the contention which this Court rejected in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 at 131-132 (1978), as follows:

> The proviso in § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, is merely an exception to that statute's broad prohibition against discriminatory pricing. It created no new federal right; quite the contrary, it defined a specific, limited defense . . . .
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> • • •
>
> [I]t is illogical to infer that by excluding certain competitive behavior from the general ban against discriminatory pricing, Congress intended to pre-empt the States' power to prohibit any conduct within that exclusion. This Court is generally reluctant to infer pre-emption, see, e.g., *De Canas v. Bica*, 424 U.S. 351, 357-358 n.5; *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127, and it would be particularly inappropriate to do so in this case because the basic purposes of the state statute and the Robinson-Patman Act are similar.

These principles apply as well in the present case.

Notwithstanding his incorrect reading of 7 U.S.C. § 2303, the Solicitor General understandably cannot join Appellants' contention that 7 U.S.C. § 2304 creates or protects a processor's right to deal with the individual farmer of his choice, recognizing that "if handlers can insist on dealing directly even with producers who have voluntarily appointed an association as their designated agent, it may be doubted whether the protections of the AFPA are in fact meaningful." Solicitor General Br. 23. The Solicitor General notes that a different (and exceedingly narrow) question is presented in cases such as *Butz v. Lawson Milk Co.*, 386 F. Supp. 227 (N.D. Ohio 1974), wherein a handler has a preexisting contract with a producer and where there is no state duty to bargain law. Solicitor General Br. 24, n.20. Similarly, the Michigan Supreme Court read *Butz*

as a case in which the handler was found in violation of the Federal Act because the handler's refusal to deal with the producer involved had a coercive effect on the producer's choice of whether to join an association. J.S. App. A16.

Appellants' attempt to read *Butz* as supporting their preemption argument is based solely on that portion of *Butz* which attempted to interpret 7 U.S.C. § 2304. The *Butz* Court *held*, however, that the defendant processor's actions were not protected by § 2304 and the Court expressly declared its analysis of that section to be *dicta*. 386 F. Supp. at 238. The abundant discussion in *Butz* of the purposes and intent of the Congress in enacting the Federal Act does not support Appellants' preemption claim. In its analysis of the legislative history of that Act the *Butz* Court significantly states that:

> The overriding purpose of Congress in enacting the [Federal Act] was to protect the individual producer of milk in his right to band together with other producers or, in effect, to unionize . . . . 386 F. Supp. at 235.

There can be no "collision" between Federal and Michigan Acts since the foregoing "overriding" Congressional purpose is precisely the same purpose sought to be achieved by the Michigan Act. See *Kesler v. Department of Public Safety*, 369 U.S. 153, 172 (1962).

The *Butz* Court characterized the legislative history of the Federal Act as one fraught with confusion and ambiguity. The Court in *Butz* stated that the Act:

> in its final form is a creature of conflicting intent and is, as a result, fraught with seemingly inconsistent and paradoxical provisions. 386 F. Supp. at 234-235.

Appellants' contention that Congress has, by enacting this "paradoxical" legislation, preempted state legislation is indefensible. The unexpressed purpose of Congress to set aside state legislation "is not lightly to be inferred . . . where the legislative command, read in the light of its history, remains ambiguous." *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, 275 (1942).

Statements made by supporters of the bill at the time of its passage by the House fail to support Appellants' contention that Congress thought it was enacting a processor rights bill that would deprive states of their right to assure that farmers could collectively bargain with processors. Representative Sisk, a key proponent, explained to the House that the purpose of the bill:

> Is to strengthen the competitive marketing system for agricultural commodities by creating several new legal remedies designed to prohibit certain unfair trade practices. Legislation is necessary in order to give farmers and their marketing associations new and greater 'market power.' 114 Cong. Rec. at 7449 (1968).

Representative May noted to her colleagues that:

> The bill before us today is the product of several years of effort directed at the objective of trying to strengthen, in one way we have within our power to do so, the bargaining power of the U.S. farmer.
>
> • • •
>
> I think I might say to my colleagues who are more familiar with labor union oriented language than they are with agricultural language that this attempts to outlaw 'yellow dog contracts.' 114 Cong. Rec. at 7456 (1968).

Representative Scherle, another supporter of the bill, noted that he was "pleased that this body has the opportunity to consider the question of providing a proper atmosphere for the exercise of bargaining rights by agricultural producers." 114 Cong. Rec. at 7459 (1968).

Representative Scott summarized the effect of the legislation as follows:

> I believe this bill accomplishes a very desirable objective; namely, to strengthen the right of farmers to band together in marketing cooperatives to increase their bargaining power. 114 Cong. Rec. at 7460 (1968).

Finally, as explained by Representative Sisk shortly before the House voted on the bill, the disclaimer section, Section 2304, "says what the bill is not intended to do. Its purpose was to say what the bill did not intend to do and thereby allay the fears of some of its opponents." 114 Cong. Rec. at 7465 (1968).

In view of the foregoing it is only by manifestly ignoring the will of Congress that one can accept the Appellants' argument that the disclaimer section creates a processor right to ignore cooperative associations of producers. Moreover, the effect of such cavalier treatment of states' rights would be felt far beyond Michigan. Since the enactment of the Federal Act several states in addition to Michigan have passed agricultural bargaining laws.[14] While those statutes do not contain Michigan's exclusive representation provision, their central "duty to bargain" provisions would be destroyed by a holding that

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14. *See, e.g.*, the Minnesota Agricultural Marketing and Bargaining Act of 1973, Minn. Stat. Ann. §§ 17.691-17.701 (West 1981); and the Maine Agricultural Marketing and Bargaining Act, Me. Rev. Stat. Ann. Tit. 13 §§ 1953-1965 (1973).

processors enjoy an absolute right to refuse to deal with cooperatives.

Such a holding would have to ignore the following aspect of Justice Brennan's concurring opinion in *National Broiler Marketing Association v. United States*, 436 U.S. 816, 837-8 (1978):

> [T]here is persuasive evidence that Congress' concern for protecting contract growers vis-a-vis processors and handlers has not abated. In 1968, Congress enacted the Agricultural Fair Practices Act of 1967, 82 Stat. 93, 7 U.S.C. §§ 2301, et seq. (1976 ed) designed to protect the 'bargaining position' of 'individual farmers' by prohibiting 'handlers' from interfering with 'producers' ' right 'to join together voluntarily in cooperative organizations as authorized by law.'

Moreover, to find such a powerful processor right in the Federal Act would squarely conflict with the following observation of the court in *Fairdale Farms v. Yankee Milk, Inc.*, 635 F.2d 1037 (2d Cir. 1980):

> As late as 1968, with the enactment of the Agricultural Fair Practices Act, Congress continued to recognize the need for stronger and more effective marketing and bargaining associations for farmers. *Id.* at 1042 (citations omitted).

Appellants' preemption argument must fail unless this Court accepts the most doubtful of propositions: that when Congress attempted to outlaw processor discrimination against those farmers who tried to organize for collective strength, Congress unwittingly granted processors the absolute right to ignore farmer associations. Such a conclusion, we submit, makes a mockery of the legislative branch.

CONCLUSION

For the reasons set forth above, the decision of the Michigan Supreme Court should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC; DUKESHERER FARMS, INC.; and FERRIS PIERSON,
Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL COOPERATIVE MARKETING ASSOCIATION, INC.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Appellants' opening brief demonstrated that certain compulsory provisions[1] of the Michigan Agricultural Marketing and Bargaining Act[2] (the "Michigan Act") stand as an obstacle to the accomplishment of the full objectives of the Federal Agricultural Fair Practices Act[3] (the "Federal Act"). A finding of preemption under this test requires a determination of the *objectives* of the Federal Act and an assessment of the *effects* of the Michigan Act on those objectives. *See Perez v. Campbell*, 402 U.S. 637, 650-52 (1971).

The language of the Federal Act discloses three objectives. First, the Act declares a farmer's[4] right to voluntarily join a cooperative and protects that right against interference by "handlers", which the Act defines to include both agricultural purchasers and cooperatives.[5] Second, the Act declares a farmer's right to refrain from joining a cooperative and protects that right from interference by purchasers and cooperatives. Third, the Federal Act protects the right of purchasers to deal directly with farmers and not cooperatives. The Federal Act's legislative history makes these objectives even more evident. The Federal Act developed from a one-dimensional bill, designed only to foster cooperatives, to a statute balancing the rights of cooperatives, independent farmers, and purchasers. (App. Br. 13-17).[6]

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1. The challenged sections of the Michigan Act are set forth at page 5 of appellants' opening brief.

2. Mich. Comp. Laws §§ 290.701-.726 (Supp. 1983).

3. 7 U.S.C. §§ 2301-2306 (1973).

4. The Federal Act calls farmers, ranchers and other growers of foodstuffs "producers". 7 U.S.C. § 2302(b).

5. 7 U.S.C. § 2302(a).

6. Appellants' opening brief is referred to as (App. Br.). The briefs of appellees and their amicus are referred to as follows: Brief for Appellee Agricultural Marketing and Bargain-

(Continued on following page)

The Michigan Act has a destructive effect on important goals of the Federal Act. Once a cooperative is accredited under the Michigan Act, each farmer in the bargaining unit is bound by the cooperative's price and other terms of trade and must pay a service fee, even if the farmer does not desire to join the cooperative. The Michigan Act forbids negotiation between individual farmers and purchasers and requires purchasers to negotiate only with the cooperative. The Michigan Act gives the accredited cooperative total control of the market: The cooperative is the exclusive agent of all farmers in the unit, whether or not they consent, and all purchasers must negotiate with the cooperative or buy nothing in the State of Michigan. The Michigan Act thereby destroys the non-consenting farmer's right to refrain from joining a cooperative and the purchaser's right to deal with farmers and not cooperatives.

Appellees respond by ignoring two of the objectives of the Federal Act and by minimizing the Michigan Act's destructive effects. They argue that the Federal Act has a single goal—to prohibit *handlers* from interfering with the right to join or not to join a cooperative. According to appellees, the Michigan legislature was free to abolish the underlying federal right not to join cooperatives, because the Federal Act did not expressly forbid the states from doing so. Further, say appellees, the California Prorate Act was "existing" when the Federal Act was passed and contains similar coercive features. This requires automatic approval of the Michigan Act, according to appellees, as does the state action doctrine of *Parker v. Brown*. Finally, appellees contend that Congress could

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Footnote continued—

ing Board - (Brd Br.); Brief of Appellee MACMA On The Merits - (MACMA Br.); Brief For The American Farm Bureau Federation As Amicus Curiae In Support Of Appellees - (AFB Br.).

not have meant to confer rights upon agricultural purchasers in section 2304, because such rights would be inconsistent with the right to form cooperatives. As shown below, appellees' arguments do not save the Michigan Act from preemption.

I. THE MICHIGAN ACT FRUSTRATES CONGRESS'S GOAL OF GUARANTEEING FARMERS A FREE CHOICE.

A. The Objective Of The Federal Act Is Not Limited To Preventing Private Acts Of Coercion.

The Federal Act, as finally passed, safeguards a farmer's right to decide whether or not to join a cooperative. "The objective of the bill is to protect the producer in the exercise of a free choice." S. REP. No. 474, 90th Cong., 1st Sess. (1967), *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1871. The declaration of policy in section 2301, the protection of the right in section 2303, and the Act's legislative history all support this conclusion. (See App. Br. 19-23).

Appellees argue that the goal of the Federal Act is not to create or protect the right to join or not to join a cooperative. Like the Michigan Supreme Court, appellees say that the Federal Act sought only to prevent coercive conduct by handlers designed to interfere with a farmer's decision. (Opinion, J.S. App. A10; MACMA Br. 22).[7] Congress's "concern was purely with harassing

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7. The Michigan Supreme Court cited a letter from the Secretary of Agriculture to support this contention. (Opinion, J.S. App. A11-A12). The letter, reproduced in S. Rep. 474, is worthless as an indication of Congress's ultimate objectives. It was written in response to an earlier version of the bill, which did not contain the critical amendments later added in the Senate. This is clear from the letter's date and its reference to superceded versions of sections 4 and 5 of the bill. 1968 U.S. Code Cong. & Ad. News at 1874-1875.

tactics that handlers and processors had employed", say appellees. (AFB Br. 10). Appellees premise this argument on the fact that the Federal Act only expressly prohibits "handler" interference with the right to join or not to join a cooperative. On this basis, Michigan claims the power to destroy the underlying right not to join a cooperative, because the Federal Act does not explicitly prohibit state destruction of this right. (Opinion, J.S. App. A10).

At the heart of appellees' argument is the notion that Congress was concerned not with the underlying economic right to join or not to join a cooperative, but only with prohibiting acts of coercion by private individuals. That notion is not supportable. As demonstrated in appellants' opening brief (pp. 19-23), the economic right of farmers to sell individually or through a cooperative was Congress's paramount concern. "We made of the legislation a two-way proposal which would actually assure to any producer the right to belong or not to belong to a cooperative." 114 CONG. REC. 7451 (1968) (Statement of Chairman Poage).

Appellees' analysis confuses the objectives of Congress with the means that Congress employed to meet those objectives. The objective of the Federal Act is "to protect the producer in the exercise of a free choice". As it often does, Congress implemented that goal by regulating private conduct. By forbidding handlers from interfering with a farmer's decision to join or not to join a cooperative, Congress protected the right of free choice. Congress's goal was not simply to outlaw acts of coercion. Forbidding handler interference was only the means by which Congress safeguarded the underlying economic right to join or not to join a cooperative.

Appellees' analysis misses the constitutional issue in this case. The question is not whether Michigan has vio-

lated the Federal Act. Only agricultural purchasers and cooperatives can violate the Federal Act. Nor is the issue whether the Federal Act expressly forbids the states from destroying the rights safeguarded by federal law. The Federal Act does not, but it need not. The Supremacy Clause already does so. The question is whether the Michigan Act, by destroying the rights protected in the Federal Act, "stands as an obstacle to the accomplishment and execution of the full objectives" of the Federal Act. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Appellees' analysis would sanction state nullification of many federal statutes. Congress often regulates the relationship between parties by prohibiting certain conduct. By preventing one individual from acting in a certain way towards another, Congress creates federal rights. States may not impair those rights, even though Congress has not expressly forbidden state interference. *Hill v. Florida*, 325 U.S. 538 (1945).

If appellees were correct, a state statute outlawing cooperatives would not conflict with the Federal Act. The right to join cooperatives is protected in the same section, by the same language, as the right not to join. 7 U.S.C. § 2303(a). If the states are free to abolish the right not to join, they must be free to abolish the right to join cooperatives. After all, the Federal Act merely proscribes coercive handler conduct; it does not expressly forbid the states from outlawing cooperatives.

The truth is that the Federal Act creates federal rights. "[I]n this bill there are rights clearly spelled out—that they have the right not to join if they so choose." 114 CONG. REC. 7449 (1968) (Remarks of Rep. Latta). Congress created these rights by prohibiting "actions designed to interfere with a producer's free choice to belong to an association." H.R. REP. No. 824, 90th Cong., 1st Sess. 5

(1967). The objective of Congress was not merely to prevent bad acts, but to preserve the underlying economic right to join or not to join a cooperative.

B. The Michigan Act Destroys A Farmer's Right To Deal Free Of Cooperatives.

The Michigan Act frustrates Congress's clear objective of protecting a farmer's right of free choice concerning cooperative membership. The Michigan Supreme Court conceded that the Michigan Act would conflict with such a federal right: "Were we to agree that § 2304, or any provision in [the Federal Act], was meant to affirmatively *create or protect* rights of private dealing between individual producers and processors, we would agree that [the Michigan Act] must fall, because, plainly, [the Michigan Act] conflicts with this result." (Opinion, J.S. App. A8). In place of Congress's goals, the Michigan Act substitutes its own objective of safeguarding the cooperative against competition, by granting the cooperative total dominance over non-consenting farmers.

Appellees nevertheless argue that there is no conflict between the Michigan Act and a federal right not to join a cooperative. Appellees point out that the Michigan Act also "protects" a farmer's right not to join a cooperative. (MACMA Br. 14). This contention is seriously misleading in two respects. First, the Michigan Act "protects" that right only from purchaser interference. It does not prohibit cooperatives from interfering with that right. (§ 4 (2)). Second, the Michigan Act protects only the bare associational right not to be a formal cooperative member; it allows cooperatives to force upon non-consenting farmers all economic aspects of cooperative membership. As shown in appellants' opening brief, Congress was concerned with a farmer's economic right to trade in a free

market, and not with hollow associational rights. (App. Br. 19-23).

Appellees then draw a false analogy to state public employment statutes, which protect an employee's associational right not to "join" a union while providing for compulsory representation and financial support. (MACMA Br. 15-17). There is no inconsistency between a right not to join and forced representation and support, say appellees, because many state legislatures see none. This contention misses the point. The question is not whether forced representation conflicts with a state-created right not to join a cooperative, but whether it conflicts with a federal right not to join.[8] The question, then, is what Congress, not the state legislature, meant when it used the word "join".

When a cooperative applies for and is granted accredited status, it coerces all non-consenting farmers to "join", within the meaning of section 2303. (App. Br. 19-23). The Michigan Act does not require cooperatives to seek accreditation; unaccredited cooperatives may represent consenting farmers, but they lack coercive power over the unwilling. The only consequence of accreditation is that the cooperative obtains the authority to coerce non-consenting farmers and purchasers. That a "democratic" vote supports the cooperative is irrelevant. The Federal Act does not establish a scheme of majority rule; it protects the rights of all farmers, including those in the minority.

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8. For the same reason, appellees' analogy to agency shops is unenlightening. The issue is not whether agency shops are inherently good or bad, but whether they conflict with federal law. Agency shops are permissible in private employment, because Congress has expressly sanctioned union security arrangements as an exception to the right not to join a union. (App. Br. 24-26). They are impermissible in the agricultural area, because the Federal Act forbids forced representation and contains no exceptions.

Appellants Ferris Pierson and Dukesherer Farms are not the only farmers who have lost their right to a free choice. Of the 433 members of the asparagus bargaining unit in 1974, only 236 consented to representation by MACMA; 197 did not. The non-consenting farmers produced nearly 7 million of the 17 million pounds of asparagus sold in the unit. In 1975, 135 asparagus farmers in a unit of 332 did not consent. In 1976, 138 of 334 did not consent. In 1977, 135 of 347 did not consent.[9]

In an effort to deemphasize this wholesale abrogation of federal rights, the Board points out that MACMA has chosen to fix only minimum, and not maximum, prices and terms of trade. (Brd Br. 9-10). But this Court has long held that the fixing of minimum and maximum prices is equally pernicious. Both "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951); *accord, United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). This is especially true in agriculture, where the setting of an unreasonably high minimum can price a farmer out of the market. (*See, e.g.*, Trial Tr., pp. 114-144). Moreover, as the Board admits, the Michigan Act allows the setting of maximum prices as well. (Brd Br. 9).

The challenged sections of the Michigan Act all operate to grant accredited cooperatives total dominance over hundreds of non-consenting farmers. The Michigan Act accomplishes this goal by restraining non-consenting farmers and their trading partners, the purchasers. The act directly binds non-consenting farmers to the terms

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9. Answers to Interrogatories to Defendant Board, signed June 7, 1977, Answer 1(m). Similarly, 288 of the 586 growers in the processing apple bargaining unit did not consent to representation. *Id.*; *see* Trial Tr. pp. 109-110.

dictated by the cooperative. (§§ 10(1), 13; Opinion, J.S. App. A6). It places a reciprocal restraint on purchasers by prohibiting them from negotiating with non-consenting farmers. § 4(1)(h). Even if the Michigan Act did not directly compel farmers to abide by the cooperative's terms of trade, section 4(1)(h) creates the same result, indirectly but just as effectively. By forbidding purchasers from negotiating with non-consenting farmers, section 4(1)(h) deprives those farmers of rights granted by the Federal Act.

Section 4(1)(g), which compels purchasers to bargain with cooperatives, has the same destructive effect on the federal rights of non-consenting farmers, even in the absence of provisions directly compelling non-consenting farmers to adhere to the cooperative's terms. If non-consenting farmers are not legally wedded to the cooperative, then they are in competition with the cooperative for the business of purchasers. In the free market system envisioned by the Federal Act, the cooperatives and independent farmers are free to use economic weapons, but not coercion, in their contest to attract purchasers. But the Michigan Act gives cooperatives a powerful weapon against the independent farmer. The act requires purchasers to negotiate with the cooperative; the independent farmer has no power to compel purchasers to negotiate with him.

Worse yet, if a purchaser does not accede to an accredited cooperative's demands, the Michigan Act empowers the cooperative to exclude the purchaser from the market, by preventing both cooperative members *and* non-consenting farmers from selling their crops to that purchaser. In the words of the statute, "the affected producers may elect, *as represented by the association*, not to sell, directly or indirectly, any quantity of the

agricultural commodity during the marketing period", if the purchaser does not agree to a contract with the cooperative. § 15 (emphasis added). The purchaser has the same choice: either come to terms with the cooperative (voluntarily or through binding arbitration), § 16, or buy none of the commodity in the State of Michigan, § 15. If a purchaser does not agree with the cooperative's terms and either the cooperative or purchaser elects to cease negotiations, the non-consenting farmer may not sell to that purchaser. The compulsory bargaining provisions thereby grant the cooperative the power to select the non-consenting farmer's customers for him.

None of the other state bargaining acts cited by appellees goes so far. No other statute appoints the accredited cooperative as exclusive agent for non-consenting farmers. For example, Minnesota's law expressly provides that the accredited cooperative "may not assess, bargain for, or claim to represent those producers who choose not to be represented by the association. Minn. Stat. § 17.694 (7) (1982).

Nor does any other state impose upon purchasers a duty to agree with the cooperative, or pain of expulsion from the state. The Minnesota Act, for example, imposes only the duty to negotiate in good faith. Minn. Stat. § 17.697(1). If the purchaser cannot agree with the cooperative, the cooperative may elect not to sell the purchaser any of its commodity. § 17.697(3)(c). The act does not prevent the purchaser from buying from non-member farmers. The California Act is similar. It imposes only a duty to bargain in good faith. Cal. Agric. Code § 54431(e) (Supp. 1983). It does not give cooperatives the power to bar purchasers from buying any quantity of produce in the state in the absence of agreement.

The Michigan Act is unique in authorizing cooperatives to totally dominate non-consenting farmers.[10] Michigan grants cooperatives the ultimate power to isolate non-consenting farmers from their customers, the agricultural purchasers. This power fundamentally conflicts with the goals of the Federal Act. As a result, the challenged provisions of sections 4(1)(g), 4(1)(h), 10, and 13 of the Michigan Act are void because of their destructive effect on the federal rights of non-consenting farmers.

II. THE MICHIGAN ACT IS NOT SAVED BY THE DOCTRINE OF PARKER v. BROWN.

Appellants' opening brief showed that the coercion of non-consenting farmers by accredited cooperatives does not constitute "state action" under the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). The Michigan scheme lacks the essential element of active state supervision. It authorizes cooperatives to impose price and other terms upon non-consenting farmers, in violation of the Federal Act. For this reason, principles of federalism that may militate against a finding of preemption of true state action do not apply in this case. (App. Br. 27-30).

Appellees respond by creating the simulacrum of state supervision. They argue that the binding arbitration provisions of the Michigan Act (§ 16) satisfy the state supervision requirement. (Brd Br. 35-36). Section 16 provides that if a cooperative and a purchaser do not agree (and neither elects to opt out of negotiations), binding arbitration will settle the dispute. Through this process, allege appellees, the state exercises the required "active supervision" of the prices set by the cooperative.

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10. Accordingly, a decision against the validity of the Michigan Act does not necessarily imperil the laws of other states.

This contention will not withstand analysis. The evidence at trial showed that asparagus prices had never been established by arbitration. There had been only one arbitration for the asparagus unit, and that involved grade, not price.[11] The record therefore discloses that the "supervision" of asparagus prices is non-existent. There had been only three price arbitrations under the Act: apples (1975 and 1976) and cabbage (1977). These infrequent arbitrations are no substitute for the active and continuous state supervision required by this Court's decisions.

Michigan's random system contrasts sharply with those regulatory schemes that have qualified as state action. In *Parker v. Brown*, state officials reviewed and approved the terms of all marketing plans. 317 U.S. at 352. In *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), a state board reviewed each dealer protest and ultimately sustained only one out of 117. 439 U.S at 110 n. 14. Under the Michigan Act, "supervision" by arbitration is the rare exception, not the rule. *See United States v. Borden Co.*, 308 U.S. 188 (1939).

Even considering the random arbitration process as supervision, it is private, not state, supervision. The arbitrators are private individuals, appointed by the parties. (§ 16(2)). In contrast to *Parker v. Brown*, the decision makers are not state officials. The California Prorate system was imposed by a sworn commission, appointed by the governor and confirmed by the senate. 317 U.S. at 346. This Court has since reaffirmed that state action must be taken by "state officials". *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 591 (1976); *see Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). Although

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11. Answers to Interrogatories to Defendant Board (First Set), signed June 7, 1977, Answer 3; Answers to Interrogatory Defendant Board (Second Set), signed July 28, 1977, Answer 9.

the Court of Appeals may theoretically review the arbitration award, none has ever been appealed. (MACMA Br. 30). In the Michigan Act's twelve-year history, therefore, no state official has ever supervised the setting of a price.

The binding arbitration procedure provides no more state supervision than a state law that requires competitors to agree on prices and requires binding arbitration if they cannot. In neither case does the state displace the market system with its own system of active state regulation. Michigan's scheme provides no safeguard against the inappropriate subordination of federal policy to state policy. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 362 (1977). It is not due any deference on state action grounds.

III. THE MICHIGAN ACT IS NOT SAVED BY FALSE ANALOGY TO THE CALIFORNIA PRORATE ACT.

The Federal Act, enacted in 1968, provides that it does not preempt "existing" state law. 7 U.S.C. § 2305 (d). As the Michigan Supreme Court conceded, section 2305 does not save the Michigan Act, which did not exist in 1968. (Opinion, J.S. App. A5). The state bargaining laws that did exist in 1968 were much like the Federal Act, containing none of the compulsory features of the Michigan Act.[12] Appellees nevertheless argue that the California Prorate Act[13] existed in 1968 and contained

12. See Appellants' Brief In Opposition To Motions To Dismiss, pp. 6-7, for a discussion of the state bargaining acts reviewed by the Senate Committee before passage of the Federal Act.

13. The original California Prorate Act, 1933 Cal. Stat. 1969, was amended in 1967 and its title was changed to the Agricultural Producers Marketing Law, Cal. Agric. Code §§ 59501-60015 (1983). The amendments did not change the purpose or substance of the act. The references that follow are to the amended act.

compulsory elements "similar" to the challenged aspects of the Michigan Act. They conclude that the Michigan Act's compulsory features must therefore be valid. (MACMA Br. 8-12; Brd Br. 23-26).

The analogy to the California Prorate Act lacks substance. The Prorate Act has nothing to do with the right to join or not to join a cooperative. The Prorate Act provides for the orderly marketing of certain commodities. It does so by the imposition of marketing plans that restrict the quantity of a commodity that farmers may produce, regulate the flow of commodities to market, or establish grade and quantity requirements. §§ 59655, 59657. The act also provides for the establishment of equalization or stabilization pools, into which all affected farmers place a certain percentage of their commodity. §§ 59801-59814. The basic goal of the statute is to minimize the adverse effects of a market surplus. § 59801; *see Parker v. Brown,* 317 U.S. 341, 355 (1943). In other words, the statute allows the creation of quotas and commodity pools to prevent gluts on the market. *See* § 59512.

Both Congress and the State of California recognize the difference between marketing order laws (like the Prorate Act) and cooperative bargaining laws. California found it necessary to pass in 1961 and periodically amend its bargaining act, Cal. Agric. Code §§ 54401-54463 (1983), despite the existence of the Prorate Act on its books since 1933. Similarly, Congress passed the Federal Act and has considered other bargaining bills despite the existence of a comprehensive federal marketing order law. Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§ 601-610 (1980). The only similarity between the two types of laws is that they both affect farmers.

The analogy to the Prorate Act is misleading in another important respect. Contrary to appellees' asser-

tion, the compulsory aspects of the Prorate Act are not "fundamentally the same" as those in the Michigan Act. State officials, not private parties, issue California marketing orders. This was true of the original Prorate Act, *see Parker v. Brown*, 317 U.S. 341 (1943), and it remains true today, Cal. Agric. Code §§ 59655-57. In an effort to create the contrary impression, appellees emphasize that a California marketing program "is established" or "implemented" only after a vote of farmers. (Brd Br. 24; MACMA Br. 10). Appellees fail to say that it is the Director of Agriculture, not the farmers, who establishes the program, after reviewing specific economic factors and holding hearings on the proposed program's terms. §§ 59655-59; 317 U.S. at 352.

That the state may coerce a farmer to adhere to a marketing order does not sanction other types of coercion. The imposition of a marketing order is valid because it conflicts with no federal law. The unsupervised coercion of non-consenting farmers by accredited cooperatives is invalid, because it conflicts with the objectives of a specific federal law regulating cooperatives. Whatever else a farmer may be forced to do, he may not be forced to join a cooperative, because Congress has forbidden it.

IV. THE MICHIGAN ACT UNDERMINES THE FEDERAL ACT'S OBJECTIVE OF PRESERVING A COMPETITIVE MARKETING SYSTEM, BY FORCING PURCHASERS TO NEGOTIATE WITH COOPERATIVES.

Certain challenged sections of the Michigan Act force agricultural purchasers to negotiate with accredited cooperatives and prevent them from negotiating with individual farmers. (§§ 4(1)(g), 4(1)(h), 13(1)). These provisions are void because they obstruct the federal rights

of non-consenting fa. ners. (See Section I.B. above). These sections are void on an independent ground as well. They frustrate the Federal Act's objective of preserving a free market system in which purchasers may not be compelled to deal with cooperatives.

Appellants' opening brief traced the evolution of the Federal Act from a bill protecting only cooperatives to a statute balancing the rights of cooperatives with the pre-existing rights of agricultural purchasers. Congress expressed that balance in section 5 of the Act (7 U.S.C. § 2304), in which it disclaimed any intent to prohibit normal dealing or to "require a handler to deal with an association of producers." By enactment of section 5, this balance became national policy. (App. Br. 31-37).

Appellees answer by claiming that section 5 merely disclaims Congress's own intent to impose mandatory bargaining, but has no effect on the states. (Brd Br. 40-45). Appellees' argument glosses over the important point: Congress deliberately refrained from imposing upon purchasers a duty to bargain with cooperatives. If Congress rejected mandatory bargaining "on the merits, and not because of any desire to leave the states free to adopt it", then a state-imposed duty to bargain conflicts with federal policy. *See UAW v. O'Brien*, 339 U.S. 454, 458 (1950).

Congress rejected mandatory bargaining on its merits. Congress believed that the ability to choose one's customers and suppliers was fundamental and should not be abridged, except to the extent of prohibiting discrimination. As the bill's co-sponsor Senator Lausch stated, "this bill does not at all deprive the purchasers or what are called handlers in the bill, of the right to choose from whomever they wish to buy. That is their constitutional

right." *Hearings on S. 109 Before the Subcomm. of the Senate Comm. on Agriculture & Forestry*, 90th Cong., 1st Sess. 14 (1967). Section 5 makes this judgment clear, by expressly protecting the purchaser's right to deal with individual farmers and not cooperatives. "[The Federal Act] is not intended to impair the right of handlers and producers to deal with each other on an individual basis, which is preserved in section 5." H.R. REP. No. 824, 90th Cong., 1st Sess. 4 (1967).

Appellees argue that Congress could not have meant what it said, because a right not to deal with cooperatives would conflict with a farmer's right to designate the cooperative as his exclusive agent. (MACMA Br. 31-46). Appellees may see an inconsistency, but Congress did not. "[N]othing in the bill prevents a handler from refusing to deal with a bargaining association notwithstanding its designation by a producer in a contract as his exclusive bargaining agent." H.R. REP. No. 824, 90th Cong., 1st Sess. 4 (1967).

This does not mean that a purchaser may insist upon dealing with a farmer who has *voluntarily* named a cooperative as his exclusive agent. To buy that farmer's crop, a purchaser must deal with the cooperative or look elsewhere for the commodity. The purchaser may have no practical choice except to deal with the cooperative, but the compulsion results from economic factors and the farmer's voluntary contract with the cooperative. The Federal Act did not intend to suspend either economic forces or the state law of contract. 7 U.S.C. § 2305(d).

Accordingly, appellants do not claim that purchasers have a right to deal with farmers who have *voluntarily* signed exclusive agency agreements with a cooperative. They claim only the right to deal with independent farm-

ers, who have not freely committed themselves to a cooperative, and the right to be free from compulsory bargaining with cooperatives. Section 5, and the federal policy that it expresses, protect both rights.

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), cited by appellees, does not compel a different result. The *Exxon* Court refused to find preemption of a state law that conflicted with federal antitrust policy. If the "broad implications" of the antitrust laws were given full effect, the states would be crippled in their ability to govern. "For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the states' power to engage in economic regulation would effectively be destroyed." 437 U.S. at 133. As the Court has since made clear, *Exxon* requires that preemption be based not on general expressions of national policy but on specific statutes. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981).

This case presents none of the problems of *Exxon*. Unlike the antitrust laws, the Federal Act does not express sweeping principles that would cripple the states if applied uncritically. The Federal Act regulates a specific segment of society: farmers, cooperatives and purchasers. Its provisions concern only the right to deal, or not to deal, with or through cooperatives. Enforcement of the Federal Act's policies will not interfere with the states' ability to govern in other areas. Appellants invoke the provisions and policies of a specific federal statute, not general expressions of national policy. As the Court has recently made clear, federal policies arising from specific statutes continue to preempt conflicting state laws. *Southland Corp. v. Keating*, 52 U.S.L.W. 4131, 4134 (U.S. Jan. 23, 1984) (No. 82-500).

CONCLUSION

Appellees show a marked hostility to the Federal Act. They call the Federal Act "paradoxical", "ineffective" and "watered-down". (MACMA Br. 29, 43; AFB Br. 7). The Michigan courts share this disdain. The trial court identified voluntary cooperatives as one of the "problems" that the Michigan Act sought to remedy. (Opinion, J.S. App. A69). According to the trial court, voluntary cooperatives "did not work". (*Id.* at A70).

Despite appellees' criticisms, voluntary cooperative membership is the "supreme law of the land", U.S. CONST., art. VI, cl. 2, as are the other provisions of the Federal Act. The Michigan Act effectively repeals the Federal Act by making membership mandatory and forcing purchasers to negotiate with cooperatives. "A state statute so at war with the federal law cannot survive." *UAW v. O'Brien*, 339 U.S. 454, 458 (1950).

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No. 82-1577

In the Supreme Court of the United States

OCTOBER TERM, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC.; and FERRIS PIERSON,

Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL CO-OPERATIVE MARKETING ASSOCIATION, INC.,

Appellees.

On Appeal From The Supreme Court Of Michigan

BRIEF FOR THE AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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In the
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Appellees.

On Appeal From The Supreme Court Of Michigan

BRIEF FOR THE AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

The American Farm Bureau Federation respectfully submits this brief *amicus curiae* in support of the appellees. Pursuant to Rule 36.2 of the Rules of the U.S. Supreme Court, written consents to file this brief have been obtained from all parties to the case and are filed herewith.

INTEREST OF AMICUS CURIAE

The American Farm Bureau Federation ("Farm Bureau") is a voluntary general farm organization which was organized in 1919 and incorporated under the "General Not-For-Profit Corporation Act" of the State of Illinois. The purpose of the Farm Bureau is to promote, protect and represent the business, economic, social and educational interests of farmers and ranchers of the United States. Farm Bureau has member state organizations in 48 states and in Puerto Rico representing more than 3 million member families.

Throughout the entire legislative process, including the introduction and amendments of the Agricultural Fair Practices Act of 1968, the Farm Bureau Federation was actively involved as a supporter of the legislation to the extent that it would strengthen the bargaining power of farmers by preventing handlers, processors and other middlemen from interfering with farmers in the formation and operation of effective marketing and bargaining associations.

Farm Bureau is concerned that its farmer members in the state of Michigan and other states which have enacted or will enact legislation similar to the Michigan Agricultural Marketing and Bargaining Act will be adversely affected if the federal Agricultural Fair Practices Act, which was intended to bolster the bargaining position of farmers, is applied to ironically weaken or eliminate such state laws which are also intended to improve farmer bargaining power supplementary to the federal Act.

As a proponent of free competition and of the ability for farmers to more readily compete in the market place by unifying to improve the terms for the sale or production of agricultural commodities, the Farm Bureau supports the position of the appellees as set forth in this brief.

SUMMARY OF ARGUMENT

The federal Agricultural Fair Practices Act is not a handler's or processor's rights statute which can be properly interpreted to prevent the state of Michigan from extending additional protection to producers and their associations in view of the void left by the federal Act.

The federal Act does not create a right for a producer not to be represented by an association of producers nor for a handler or processor to deal with whom they choose. The sole and limited function of the law is to curb improper coercive activity by handlers against producers so as to impact their decision to join or refrain from joining or otherwise deal with an association.

Compliance with the federal Act and the Michigan Agricultural Marketing and Bargaining Act is not a physical impossibility nor does the state law stand as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress so as to require invalidation of the state law under the federal preemption doctrine.

ARGUMENT

THE MICHIGAN AGRICULTURAL MARKETING AND BARGAININIG ACT IS NOT PREEMPTED BY THE FEDERAL AGRICULTURAL FAIR PRACTICES ACT UNDER ARTICLE VI OF THE UNITED STATES CONSTITUTION.

A. The Purpose Of The Michigan Agricultural Marketing And Bargaining Act And Of The Federal Agricultural Fair Practices Act, To Strengthen The Marketing And Bargaining Position Of Individual Producers, Is The Same, And The Additional Protection Provided By The Michigan Act In Regulating The Bargaining Relationship Is Consistent With Such Purpose.

A resolution of the issue before this Court regarding the compatibility of the Michigan Agricultural Marketing and Bargaining Act, Mich. Comp. Laws §§290.701 to 290.726 and the Agricultural Fair Practices Act, 7 U.S.C. 2301 to 2306, requires a basic understanding of the purposes of both statutes.

In passing the Agricultural Fair Practices Act in 1968, Congress did not intend to promote and protect the economic interests of handlers, processors and other middlemen over the interests of agricultural producers and their associations. To the contrary, it was the economic bargaining power of individual producers and their associations which was threatened and in need of protection.

In the report of the U.S. Department of Agriculture recommending passage of the Act, Secretary of Agriculture Freeman stated:

> Producers have suffered harassment and reprisal by some processors because of activity in organizing and joining a cooperative. Grower contracts have been canceled or reduced in volume. Processors have offered inducements to growers not to join a cooperative. Attempts have been made to buy off the cooperative's leaders to create dissension in the organization.
>
> Processors operating in several production areas have coerced growers desiring to form a bargaining cooperative by threatening to leave the cooperative's territory and expand operations elsewhere. Growers have failed to get redress after such questionable processor actions.
>
> If this bill were enacted, many producers who fear harassment or discrimination would feel free to join a cooperative association. It would help producers use cooperatives as a more effective tool in marketing their products.[1]

Apart from the conclusions of the Secretary, the hearings before the Subcommittee of the Senate Committee on Agriculture and Forestry relative to the need for the Act contain statements of numerous individuals who attested to the unfair treatment of producers who joined or were desirous of joining an association.[2]

Congress had passed Section 6 of the Clayton Act, 15 U.S.C. 17, in 1914 and the Capper-Volstead Act, 7 U.S.C. 291 to 292, in 1922, to allow the formation of cooperatives (producer associations) as an exception to the anti-trust laws so that such organizations could function to represent

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[1] U.S. Code. Cong. and Admin. News (1968), page 1875.

[2] Hearings on S. 109 Before the Subcommittee of the Senate Committee on Agriculture and Forestry, 89th Cong., 2nd Sess. (1966). Hearings on S. 109 Before the Subcommittee of the Senate Committee on Agriculture and Forestry, 90th Cong., 1st Sess. (1967).

farmers in certain legitimate marketing and bargaining objectives. As explained by Senator Capper, the Capper-Volstead Act was ". . . to give the farmer the same right to bargain collectively that is already enjoyed by corporations."[3]

The ultimate goal under the Agricultural Fair Practices Act in preventing discriminatory conduct by handlers was to give producer associations the opportunity to survive so as to carry out legitimate marketing and bargaining activities for farmers as Congress had previously authorized in 1914 and 1922.

As stated by Secretary Freeman in his testimony before the Senate Subcommittee in support of the Act:

> Because he usually acts individually, the farmer has almost no strength at the bargaining table. It is only when the farmers act in concert that the bargaining process can function as intended in our free enterprise system. It is simply too much to expect a result fair to both parties and in the national interest when one party at the bargaining table is so much stronger than the other. Congress recognized this when it enacted laws governing bargaining between labor and management.
>
> Farmers and their cooperatives are simply asking in S. 109 [the Agricultural Fair Practices Act] that they have the same right to organize and to bargain in the marketplace that is accorded other groups. The act before you will be an important step in that direction.[4]

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[3] 62 Cong. Rec. 2057 (1922).

[4] Hearings on S. 109 Before the Subcommittee of the Senate Committee on Agriculture and Forestry, 90th Cong., 1st Sess. (1967), pages 21-22.

While the Fair Practices Act, as finally signed into law, was aimed at strengthening farmer bargaining power, the law, in fact, has had little if any impact on achieving such goal. One author of a compilation of the legislative history of the Act has even described the law as being "watered down" which may be attributed to the tremendous opposition to the law by the processing industry and the disunity among the proponents of the legislation.[5]

The narrow result which Congress achieved "for farmers" in the Act is contained in the prohibited practices section, 7 U.S.C. 2303, which purports to curb coercive acts, threats, intimidation, and other patently improper pressure directed against farmers to prevent them from attaining the benefits which may be achieved through a marketing or bargaining association.

What the Fair Practices Act failed to do was to establish meaningful standards and requirements to regulate the bargaining relationship between producer associations and processors and to regulate the representational relationship between producers and producer associations.

Numerous bills have been unsuccessfully introduced to amend the Fair Practices Act and to serve as independent legislation to "fill in" the void left by the Act.[6]

The Michigan legislature, in response to the need to promote and protect the interests of its farmers, passed

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[5] Torgerson, Randall E., Producer Power at the Bargaining Table, University of Missouri Press, 1970, page 213.

[6] See Hearings on S. 726, S. 727, S. 1775, S. 1972 and S. 2846 Before the Subcommittee of the Senate Committee on Agriculture and Forestry, 92nd Cong., 1st Sess. (1971) and Hearings on H.R. 348, H.R. 7597, H.R. 8886, H.R. 8887 and similar bills Before the Subcommittee of the House Committee on Agriculture, 92nd Cong., 1st Sess. (1971). Also see H.R. 4975, 97th Cong., 1st Sess. (1981).

the Michigan Agricultural Marketing and Bargaining Act, Mich. Comp. Laws §§290.701 to 290.726, in 1972.

To interpret the federal Act to preempt the Michigan Act according to the federal preemption doctrine as recently explicated in *Fidelity Federal Savings and Loan Ass'n., et al.* v. *de la Cuesta*, 458 U.S. 141 (1982), would stand the Fair Practices Act on its head. Such an application of the federal law would clearly turn the Act into a "processor's rights" law which would effectively block the Michigan legislature and other states[7] from regulating the often one-sided bargaining relationship between producer associations and processors.

In its judgment, the Michigan legislature has made it an unfair practice for a handler of agricultural commodities to refuse to bargain with or recognize an accredited association of producers which represents over one-half of the producers who produce over one-half of the commodity in a designated bargaining unit. Mich. Comp. Laws §290.704 (1)(g). Clearly, if a handler refused to bargain under such circumstances, the producer association could be effectively undermined. To further provide effectiveness and order to producer associations, the Act makes an accredited association, described above, the exclusive representative of all producers in a designated unit, regardless of their membership in the association. Mich. Comp. Laws §§290.710 and 290.713. Such a measure is essential to create unity within a bargaining area to provide an ac-

[7] The New York legislature has recently enacted legislation to require good faith bargaining between processors and growers pursuant to a marketing order approved by two-thirds of the growers in the area affected. N.Y. Agric. Mkts. Law §§293-294. (McKinney Supp. 1982).

credited association with the needed bargaining power to command meaningful negotiations with handlers.[8]

The Michigan Act squarely adds additional protection to producers and their associations not afforded by the federal Fair Practices Act. A state should be permitted to go further in protecting its citizens by filling in a void left by a federal statute as long as the state law is not inconsistent with federal law or would not otherwise stand as an obstacle to the accomplishment of Congressional purposes and objectives of federal law. *Goldstein* v. *California*, 412 U.S. 546 (1973), *Credit Data of Arizona, Inc.* v. *State of Arizona*, 602 F. 2d 195 (9th Cir. 1979), *In the Matter of Jama*, 436 F. Supp. 936 at 965, (M.D. Fla. 1977).

As conceded in the Jurisdictional Statement at page 8, the Fair Practices Act has not preempted the field in view of Section 6, 7 U.S.C. 2305, which provides that state law shall not be changed or modified. Since Congress has not expressly preempted state regulation in the federal Act nor in the legislative history, the added protection of the Michigan Act should stand. *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977).[9]

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[8] The Michigan Act additionally prevents a handler from negotiating directly with a producer, once an association is accredited for the bargaining unit in which the producer is included. Mich. Comp. Laws §290.704(1)(h).

[9] See page 540 in *Rath*, 430 U.S. 519 (1977).

B. By Prohibiting Improper Pressure On A Producer In The Exercise Of His Decision To Join Or Refrain From Joining An Association, The Agricultural Fair Practices Act Does Not Thereby Create An Absolute Right For A Producer Not To Be Represented By An Association.

There is no actual or implicit conflict between the requirement in the Michigan Act that accredited associations shall serve as the exclusive representative of all producers and the requirement in the federal Fair Practices Act that neither processors nor associations of producers may exert *improper pressure* on producers to influence their decision to join or refrain from joining an association.

Since the federal Act did not provide for good faith bargaining and exclusive representation of producers by producer associations, there was no compelling reason for Congress to provide in the same law whether a producer should have a right not to be represented by an association. The concern was purely with harassing tactics that handlers and processors had employed to discourage producer membership and affiliation with associations.

The appellants' argument that the Agricultural Fair Practices Act gives a producer the right not to be represented by an association and that such right is violated by the Michigan Act would require this Court to erroneously rule that "legislative enactment" constitutes improper coercive activity when the federal Act only proscribes coercive activity by handlers.

The only right guaranteed by the Fair Practices Act is the right of a producer to be free from *improper pressure* when a producer makes a decision to associate, not associate, or otherwise contract with an association. As stated in the "Findings and Policy" section of the Senate Report

No. 474 on the Agricultural Fair Practices Act, 90th Cong., 2nd Sess. (1967):

> Farmers have cited the wider use and acceptance of contract marketing and the growing concentration of power in the hands of fewer and larger buyers as reasons for the need for stronger and more effective marketing and bargaining associations of farmers. Producers voluntarily join these marketing associations as a means of uniting to market their commodities.
>
> Many witnesses contended that if the producer is to be given a free choice, he should be protected from *improper pressure* in either direction either to join or not to join an association, and the legislative findings reflect this objective. [Emphasis added].[10]

The operative sections of the federal Act and the Michigan Act clearly serve different functions to accomplish the general purposes of strengthening producer bargaining power and are not in conflict.

C. The Agricultural Fair Practices Act Does Not Create A Right For Handlers Or Processors To Deal With Whom They Choose.

There is no conflict between the requirements in the Michigan Act that a handler must negotiate with an accredited association as the exclusive representative of all producers in a bargaining unit and the disclaimer section of the federal Act which merely clarifies that Act is not intended to *require* a handler to negotiate or deal with an association of producers:

Disclaimer of intention to prohibit normal dealing

> Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor re-

[10] U.S. Code. Cong. and Admin. News (1968), page 1869.

quire a handler to deal with an association of producers. 7 U.S.C. 2304.

Congress's sole purpose in adding such clause was to allay the fears of processors and other purchasers of agricultural products that the prohibited practices section of the federal Act, 7 U.S.C. 2303 (a), (b), (c) and (d), would be erroneously interpreted to require dealing with producer associations.

By passing the prohibited practices section of the Act, 7 U.S.C. 2303 (a), (b), (c) and (d), Congress wanted to prevent processors from any activity, including selecting persons with whom processors would do business, for the purpose of pressuring a producer not to join or contract with an association. Any other business transactions engaged in by a processor which were not for such wrongful purpose were not to be considered as "improper pressure" prohibited by the Act.

The thrust of the disclaimer section is to show Congressional intent that only business transactions tainted with improper motives, as opposed to other "normal" business transactions, were to be prohibited. The section was not intended to create an unqualified right for a handler to deal directly with producers who have joined an association.

As stated in the Senate Report No. 474:

> Section 5 [7 U.S.C. 2303] disclaims any intent to prevent handlers and producers from selecting their customers and suppliers *for any reason other than a producer's membership in an association of producers,* or to prevent handlers and producers from dealing with one another individually on a direct basis, or to require a handler to deal with an association of producers. The bill does not prevent or require these actions and is not intended to do so. While the proponents of the bill stated in their testimony that this was not the purpose, there was some concern, especially on the

> part of processors and other purchasers of agricultural products, that the bill in fact went further than intended. The committee felt that a clear statement in the bill itself would be helpful to courts, handlers, associations, producers, and others in their construction of this legislation; and has recommended inclusion of this section in the bill. [Emphasis added.][11]

The net effect of the Act's disclaimer clause (passed only to explain what the Congress did not do) and the prohibited practices section is one of neutrality towards normal dealings between handlers, producers, and producer associations. Together, the sections do not require or prevent selection of customers or bargaining under normal circumstances. Given the neutrality of the federal law, there can be no conflict with the Michigan Act's bargaining requirement relative to accredited producer associations.

CONCLUSION

For the reasons set forth above, there is no conflict between the federal Agricultural Fair Practices Act and the Michigan Agricultural Marketing and Bargaining Act. Therefore the decision of the Michigan Supreme Court, reported at 416 Mich. 706, 332 N.W. 2d 134 (1982), should be affirmed.

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[11] *Ibid.*, page 1873.

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF OF THE AMERICAN FROZEN FOOD INSTITUTE AS *AMICUS CURIAE* SUPPORTING APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1577

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., *ET AL.*,

Appellants,

v.

AGRICULTURAL MARKETING AND BARGAINING BOARD, *ET AL.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF OF THE AMERICAN FROZEN FOOD INSTITUTE AS *AMICUS CURIAE* SUPPORTING APPELLANTS

STATEMENT OF INTEREST OF THE AMERICAN FROZEN FOOD INSTITUTE

The American Frozen Food Institute submits this brief *amicus curiae*[1] in support of appellants' position that the Michigan Supreme Court erred in holding that provisions of Michigan's Agricultural Marketing and Bargaining Act (Mich. Comp. Laws §§ 290.701-.726 (Supp. 1982)) ("Michigan Act"), were not preempted by the Federal Agricultural Fair Practices Act of 1967 (7 U.S.C. §§ 2301-2306 (1982)) ("Federal Fair Practices Act").

The American Frozen Food Institute ("AFFI") is a national nonprofit trade association representing frozen food processors

[1] The brief is filed with the consent of the parties pursuant to Rule 36.2. Letters containing the consent of the parties have been filed with the Clerk of the Court.

that account for approximately 80 percent of the United States frozen food production. Many AFFI members negotiate for the purchase of agricultural commodities with producer bargaining associations, with individual producers who have not joined a bargaining association, and, under certain circumstances, with individual producers who are members of an association, such as where the association has no exclusive marketing contract with its members. The Michigan Act imposes severe restrictions on AFFI members' negotiating and purchasing practices by prohibiting producers, in specified situations, from selling a commodity at a price other than that fixed in a contract between an association of producers and a purchaser, and by prohibiting purchasers from negotiating with individual producers.

Specifically, the Michigan Act provides for the formation and operation of a producer bargaining association that is the exclusive bargaining and marketing agent for all the producers of an agricultural commodity in a bargaining unit. An association composed of more than 50 percent of the producers of an agricultural commodity, producing more than 50 percent of the quantity of such commodity in the bargaining unit, may become the exclusive bargaining and marketing agent for all producers in the unit, including those who have not voluntarily joined the association as members. Nonmembers as well as members are bound by the terms and conditions of the marketing contract negotiated by the association with a purchaser. All producers in the bargaining unit must pay fees to the producer association even though they do not wish to join or surrender their freedom to negotiate individually with purchasers.

Under certain conditions, the Michigan Act requires purchasers of commodities, referred to as "handlers," to bargain with the association. Once the association enters a contract with a handler on behalf of the bargaining unit, under no circumstances may handlers negotiate directly and individually with any producer included in that unit, regardless of whether the producer is or is not a member of the bargaining association. *Michigan Canners & Freezers Ass'n, Inc.* v. *Agricultural Marketing & Bargaining Board*, 416 Mich. 706, 715, 332 N.W.2d 134, 137-38 (1982) ("*Michigan Canners*"); Mich. Comp. Laws §§ 290.704(1)(g) and (h); 290.707(c); 290.710; 290.713 (Supp. 1982).

Thus, the Michigan Act interferes with a basic principle underlying our economic system – the right of a buyer to choose among competing sellers of goods and services and the right of a seller to choose among competing purchasers, in order to negotiate the best prices and terms. Through the mechanism of an exclusive bargaining agent, handlers are prohibited from negotiating with individual producers in a bargaining unit who would normally be in competition with each other. Producers are effectively coerced into joining a producer association and, in any event, are required to sell their produce only on terms and conditions set by the exclusive bargaining agent. The freedom of a producer to negotiate individually with a handler, or to join with competing producers in the marketing of his commodities, and the freedom of a handler to choose among competing sellers, are rights conferred and protected by the Federal Fair Practices Act and interfered with by the Michigan Act.

Because the ability of producers and handlers to negotiate with each other individually is eliminated in favor of uniform terms covering all producers in a bargaining unit, AFFI members and consumers will face restricted availability of, and pay higher prices for, agricultural commodities than if competition were not curtailed.[2]

SUMMARY OF ARGUMENT

Under the Supremacy Clause, state legislation that is in conflict with a federal statute, or thwarts its objectives, is preempted. *See, e.g., Fidelity Savings & Loan Ass'n* v. *De La Cuesta*, ____ U.S. ____, 102 S.Ct. 3014, 3022 (1982). The Michigan Supreme Court's holding that provisions of the Michigan Agricultural Marketing and Bargaining Act were not in conflict with the terms and objectives of the Federal Agricultural Fair Practices Act of 1967 is based upon an erroneous interpretation of the Federal Act and is erroneous for at least five distinct

[2] Prior to the Michigan Supreme Court decision now before this Court, the Michigan Supreme Court remanded the matter to the Circuit Court for findings of fact as to the effect of the Michigan Act. The Circuit Court found that under the Michigan Act "the consumer will experience . . . increased food prices." (J.S. App. A67).

reasons. In fact, a direct conflict exists between the Federal Fair Practices Act and provisions of the Michigan Act requiring that provisions of the Michigan Act be invalidated.

The Michigan court's construction of the Federal Fair Practices Act did not take into consideration the Capper-Volstead Act, which confers a right on producers to join together voluntarily in producer associations. The purpose of the subsequently enacted Federal Fair Practices Act was to protect this right free from coercion. Because the court below failed to recognize the relationship between the two acts, it wrongfully concluded that the Federal Fair Practices Act did not prohibit producer association coercion as authorized by the Michigan Act.

Further, the Federal Fair Practices Act expressly prohibits "handlers" from coercing producers into joining producer associations. The term "handler" is statutorily defined as encompassing producer associations. 7 U.S.C. § 2302(a). The decision of the court below fails to give effect to this definition.

The Michigan court's interpretation of the Federal Fair Practices Act as permitting the state to authorize anticompetitive conduct is in conflict with the Sherman Act. Uniform pricing and other concerted conduct involving producers who have not voluntarily agreed to cooperate, as authorized by the Michigan Act, is not state action exempt from the Sherman Act. Because of the importance of the policies underlying the federal antitrust laws, the Federal Fair Practices Act should have been construed in a manner consistent with the Sherman Act so as to preempt conflicting state requirements.

Similarly, the interpretation below of the Federal Fair Practices Act, as authorizing conduct compelling producers to support producer associations and prohibiting producers and purchasers from directly dealing with each other, violates First Amendment rights. The Federal Fair Practices Act should have been construed in a manner consistent with the exercise of First Amendment rights, which would require the preemption of the provisions of the Michigan Act in conflict with those rights.

The "existing State law" provision of the Federal Fair Practices Act, 7 U.S.C. § 2305(d), was misconstrued to be an

indication of Congressional intent to permit states to regulate conduct inconsistently with the Act. The terms and legislative history of this provision demonstrate no such intent, but rather the limited purpose of preserving certain state remedies to supplement the Federal Fair Practices Act's protections.

ARGUMENT

The Court Below Erred In Construing The Federal Agricultural Fair Practices Act As Not Preempting The Michigan Agricultural Marketing And Bargaining Act

The Michigan Supreme Court concluded that the Federal Fair Practices Act did not conflict with the Michigan Act and, therefore, ruled that federal legislation did not preempt the state legislation. This conclusion was based upon an erroneous interpretation of the Federal Fair Practices Act. It is erroneous for at least five separate reasons.

A. The Interpretation Of The Federal Fair Practices Act Fails To Give Proper Consideration To The Capper-Volstead Act

The Capper-Volstead Act, 7 U.S.C. §§ 291-292 (1982), expressly creates the right of producers voluntarily to join with other producers in marketing their products. The act provides that "[p]ersons engaged in the production of agricultural products as farmers . . . *may* act together in associations, corporate or *otherwise*, . . . in collectively . . . marketing . . . such products. . . ." 7 U.S.C. § 291 (emphasis added). This act has been construed as creating a right of producers voluntarily to join with other producers free of coercion from others, including producers acting individually or through associations. *See, e.g., United States* v. *Dairyman, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981); *Fairdale Farms, Inc.* v. *Yankee Milk, Inc.*, 635 F.2d 1037, 1044 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

The Federal Fair Practices Act, enacted in 1968, supplements the Capper-Volstead Act, enacted in 1922, and was designed principally to prevent coercion or other unfair interference with agricultural producers voluntarily joining and participating

in bargaining associations. The Federal Fair Practices Act, by its terms and legislative history, clearly reaffirms and protects the right of a producer to join or not to join with other producers, free from coercion, in marketing activities. The failure of the decision below to give weight to the provisions and policy of the related Capper-Volstead Act in interpreting the Federal Fair Practices Act was in error, leading the Michigan court wrongfully to uphold the validity of the Michigan Act.

By its express terms, the Federal Fair Practices Act provides that producers have a right to join or not to join with others to form producer associations. Section 2301 formally declares as Congressional policy that individual farmers, in order to improve their marketing and bargaining position, "are *free* to join together *voluntarily* in cooperative organizations. . . ." 7 U.S.C. § 2301 (emphasis added). Section 2303(a) further provides that a producer has a "right to join and belong to or *to refrain from joining or belonging to* an association of producers," and protects this right from interference by "handlers." 7 U.S.C. § 2303(a) (emphasis added).[3]

The legislative history amplifies this right. For example, the report of the Senate Committee on Agriculture and Forestry states:

> This bill is designed to protect the agricultural producer's *right* to decide, *free from improper pressures*, whether or not he wishes to belong to a marketing or bargaining association.

S. Rep. No. 474, 90th Cong., 1st Sess. (1967), *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867 (emphasis supplied). During the Senate Subcommittee Hearings, Senator Williams, a proponent, noted, "Freedom of choice of any farmer to join or not to join an organization of his choice is a basic American right and it must be protected." *Agricultural Producers Marketing Act: Hearings on S. 109 Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on*

[3] The Federal Fair Practices Act also confirms the right of producers and handlers to select their own customers and suppliers, 7 U.S.C. § 2304.

Agriculture and Forestry, 90th Cong., 1st Sess. 10 (1967). *See also* 114 Cong. Rec. 7449-51 (1968) (statements of Reps. Latta, Poage, and May).

Under the Michigan Act, as interpreted by the Michigan Supreme Court, an association comprised of more than 50 percent of the producers in a bargaining unit, which represents more than 50 percent of the commodity produced in that bargaining unit, may become the exclusive bargaining and sales agent for all of the producers in the unit.[4] Thus, the association may include up to 49 percent of producers who have chosen not to join or enter into marketing contracts with the association. Producers who may choose not to join the association voluntarily are effectively pressured to do so as all producers must support the association by paying a service fee, must sell their commodities only at the price set by the association, and are prohibited from negotiating directly with any handler. *Michigan Canners*, 416 Mich. at 715, 332 N.W.2d at 137-38.

The Michigan Act expressly authorizes activities that coerce producers to join producer associations, and thus conflicts with the objective of the Federal Fair Practices Act and its antecedent statute the Capper-Volstead Act – to provide producers

[4] Under the Michigan Act, a producer association may become the exclusive bargaining agent only after accreditation by a five member Agricultural Marketing and Bargaining Board appointed by the state. This board, upon petition of not less than 10% of the producers of the commodity eligible for membership in the proposed bargaining unit, as defined in the association's petition for accreditation, shall determine, after a public hearing, the appropriateness of the proposed bargaining unit in terms of commodity and geographic area. An association must be accredited if it meets specified criteria, including that the bargaining unit has contracts which cover more than 50% of the quantity of that commodity produced in the bargaining unit which involve more than 50% of the producers of that commodity in that unit. Upon petition of at least 1/3 of the producers in the proposed unit, producing at least 1/3 of the commodity in the proposed unit, a referendum of all producers in the unit shall be held. The association will remain accredited if the referendum is approved by more than 50% of the producers in the unit producing more than 50% of the quantity of the commodity. Mich. Comp. Laws §§ 290.703-.704, 290.706-.707, 290.710.

with a right to voluntarily join or not to join, free of coercion, with other producers in bargaining activities. Accordingly, the state legislation must give way to the federal. *See, e.g., Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978).

B. The Interpretation Of The Federal Fair Practices Act Fails To Give Effect To The Statutory Definition Of "Handler"

The Federal Fair Practices Act prohibits coercive conduct by "handlers." The Michigan Court construed the term "handler" as not including producer associations. However, placing producer association conduct outside of the scope of the Federal Fair Practices Act is inconsistent with the statutory definition of "handler."

> (a) The term "handler" means *any person* engaged in the business or practice of . . . (3) contracting or *negotiating contracts or other arrangements . . . on behalf of producers . . . with respect to* the production or *marketing* of any agricultural product. . . .

7 U.S.C. § 2302 (1982) (emphasis added). The term "person" is defined to include "associations." 7 U.S.C. § 2302(d). The definition of "handler" is sufficiently broad to encompass producer associations and has been so construed by the federal courts. *See Butz* v. *Lawson Milk Co.*, 386 F. Supp. 227, 235 (N.D. Ohio 1974); *Marketing Systems Plan, Inc.* v. *Associated Milk Producers, Inc.*, 338 F. Supp. 1019, 1024 (S.D. Tex. 1972). The definition of "handler" in the Michigan Act, which expressly excludes producer associations, is inconsistent with that of the Federal Fair Practices Act. Mich. Comp. Laws §§ 290.702(a) and (g).

The legislative history of the Federal Fair Practices Act demonstrates the Congressional intent to include producer associations within the meaning of handlers so that the prohibitions against conduct pressuring producers to join associations are also applicable to associations of producers. The original language of the bill which became the Federal Fair Practices Act, S. 109, 90th Cong., 1st Sess. 9 (1967), stated:

> Sec. 4 It shall be unlawful for any handler or association of producers knowingly to engage . . . in the following practices:
>
> (a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers. . . .

113 Cong. Rec. 21,410 (1967).

The Senate Report noted:

> The objective of the bill is to protect the producer in the exercise of a free choice. Many witnesses suggested that the bill did not fully accomplish this purpose, because it protected the producer only from improper pressure not to join an association. To protect his free choice *he should also be protected from* improper pressure in the other direction, *improper pressure to join an association*. The Committee . . . was convinced . . . that if the objective is to protect the producer and afford him a free choice, the bill should protect him from pressure in either direction.

S. Rep. No. 474, 90th Cong., 1st Sess. 5 (1967), *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1871 (emphasis added).

The House Committee on Agriculture initially rejected a proposal "to delete the application of any prohibited practices . . . to associations of producers. . . ." H.R. Rep. No. 824, 90th Cong., 1st Sess. 4 (1967). However, the House subsequently deleted the phrase "or association of producers" from Section 4 of H.R. 13541, 90th Cong., 1st Sess. (1967), at the suggestion of the Committee on Rules. *See* 114 Cong. Rec. 7449 (1968). The reason for this deletion was explained by Representative Sisk on behalf of the Rules Committee:

> *Since the bill already makes clear that associations of producers are not excluded from*

> *the term "handler,"* this phrase is redundant and could be misconstrued as unfairly pointing the finger of accusation to associations of producers. This is not the intent; and while my amendments do not change the purpose or basic meaning of the bill, they make misinterpretations more difficult.

114 Cong. Rec. 7464 (1968) (emphasis added). The Chairman of the House Committee on Agriculture, Representative Poage, described the bill as "a two-way street – to make of it a protector of the right of the producer to determine for himself whether he cared to or did not care to become a member of a cooperative." 114 Cong. Rec. 7451 (1968).[5] Thus, the express statutory terms and the legislative history demonstrate a clear intention by Congress to prohibit coercive conduct by producer bargaining associations as well as other handlers. Because the producer associations created under the Michigan Act negotiate contracts on behalf of all producers in the bargaining unit, such an association falls within the definition of "handler" as defined in 7 U.S.C. § 2302. Therefore, it is a violation of the Federal Fair Practices Act for that producer association to "coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers. . . ." 7 U.S.C. § 2303(a). The Michigan Act clearly sanctions such coercion prohibited by the Federal Fair Practices Act, since all producers in a bargaining unit must financially support the producer association, must sell their commodities only at the terms set by the producer association, and are barred from negotiating directly with a handler. Accordingly, the state's legislation must yield to the federal. *Fidelity Savings & Loan Ass'n* v. *De La Cuesta,* ____ U.S. ____, 102 S.Ct. 3014, 3022 (1982).

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[5] One of the reasons advanced for preserving the producer's right not to join an association was that the "fees being charged by these associations are no small matter to the farmer." 114 Cong. Rec. 7450 (1968) (remarks of Rep. Latta).

C. The Interpretation Of The Federal Fair Practices Act Fails To Give Proper Consideration To The Sherman Act

The Michigan Act authorizes private parties to engage in anticompetitive conduct. For example, all producers in a bargaining unit, even those who did not voluntarily join, must utilize the producer association as exclusive bargaining agent and are bound by the prices it negotiates. Handlers are expressly prohibited from seeking to negotiate individually with any producer in the bargaining unit. Mich. Comp. Laws §§ 290.704(1)(h); 290.707(c); 290.710(1) and (2). This concerted action by all producers in setting prices and marketing a commodity is clearly violative of the Sherman Act. 15 U.S.C. §§ 1 *et seq.* (1982). The court below erred in interpreting the Federal Fair Practices Act as permitting the states to authorize conduct that contravenes the Sherman Act.

The Federal Fair Practices Act contains no express provision sanctioning conduct in violation of the federal antitrust laws by producers who have not agreed to voluntarily join together. It is well settled that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored. . . ." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963). There is no basis to imply a repeal here for such conduct. To the contrary, the Federal Fair Practices Act, when read in conjunction with the Capper-Volstead Act, *supra*, in part A, demonstrates an intention by Congress not to grant broad antitrust immunity.

This Court has held that the Capper-Volstead Act provides for a limited repeal of the antitrust laws. *See Maryland & Virginia Milk Producers Ass'n* v. *United States*, 362 U.S. 458 (1960); *United States* v. *Borden Co.*, 308 U.S. 188, 203-06 (1939). This repeal is restricted to concerted activity in processing, handling and marketing agricultural commodities by producers who choose voluntarily to join together for such purposes. *See Maryland & Virginia Milk Producers Ass'n*, 362 U.S. at 464-67. This repeal does not extend to conduct by producers to coerce other producers into concerted activities. *See, e.g., United States* v. *Dairyman, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981);

Fairdale Farms, Inc. v. *Yankee Milk, Inc.*, 635 F.2d 1037, 1044 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

In *National Broiler Marketing Ass'n* v. *United States*, 436 U.S. 816 (1978), this Court held that the Capper-Volstead Act granted limited immunity from antitrust liability for those concerted activities that were conducted solely by producers who were authorized under that act to join together. Where some of the persons acting jointly were not so authorized, the activity was proscribed by the Sherman Act. The concerted activity authorized by the Michigan Act involves joint action by producers who have voluntarily agreed to cooperate, which is exempt from the antitrust laws by the Capper-Volstead Act, and joint action by producers who have not voluntarily agreed to cooperate, which is not exempt. The concerted activity of all producers is thus outside the scope of the limited antitrust immunity of the Capper-Volstead Act.

The Michigan Supreme Court's interpretation of the Federal Fair Practices Act as not precluding the anticompetitive conduct authorized by the Michigan Act is, therefore, inconsistent with these cases specifically addressing the extent of antitrust immunity for joint action by producers, and is contrary to the general principle that any exemption from the antitrust laws is to be strictly construed. *Federal Maritime Comm'n* v. *Sea Train Lines, Inc.*, 411 U.S. 726, 733 (1973); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963).

The concerted activities authorized by the Michigan Act of producers who have voluntarily joined together and those who have not, do not constitute "state action" falling outside of the Sherman Act. *Parker* v. *Brown*, 317 U.S. 341 (1943).[6] The Michigan Act merely authorizes private parties, producer associations and handlers, to enter into exclusive marketing contracts which bind not only members of the producer association, but all producers within the bargaining unit. These contracts set the terms and conditions, including price. Since the "State

[6] The "state action" doctrine appears to have been relied upon by the court below as justification for its upholding the validity of the Michigan Act. *Michigan Canners*, 416 Mich. at 719 n.13, 332 N.W.2d at 139-40 n.13.

neither establishes prices nor reviews the reasonableness of the price schedule; nor does it regulate the terms of . . . contracts," such conduct is not state action exempt from the Sherman Act. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980). As in *Midcal* where this Court invalidated the state law, the state legislation "simply authorizes price setting and enforces the prices established by private parties." *Id.* at 105. *See Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951).

Because of the importance of the Sherman Act to the elemental principle of competition which underlies our economic system, it is necessary that other statutes affecting competition be construed, whenever possible, in harmony with it. The court below thus erred in interpreting the Federal Fair Practices Act so as to permit state legislation violative of the Sherman Act to be sustained.

D. The Interpretation Of The Federal Fair Practices Act Fails To Give Proper Consideration To The First Amendment

The Michigan Act's provisions compelling producers who do not voluntarily join a producer association to support that association financially, and prohibiting these producers, as well as handlers, from negotiating with one another individually, directly interfere with the right of suppliers and purchasers to choose those with whom they wish to deal and on what terms. The court below correctly noted that the legislation raised First Amendment concerns. *Michigan Canners*, 416 Mich. at 719 n.13, 332 N.W.2d at 139-40 n.13. Nevertheless, the Federal Fair Practices Act was construed as permitting the state to restrict the First Amendment rights of speech and association. Because of the importance of these rights, the Federal Fair Practices Act should be construed in a manner consistent with the full exercise of these rights, unless the Federal Fair Practices Act demonstrates the necessity for curtailing them, and a clear Congressional intent to do so. *See Abood* v. *Detroit Board of Education*, 431 U.S. 209, 222 (1977); *Railway Employees Department* v. *Hanson*, 351 U.S. 255 (1956). Since such a necessity and intent are absent here, the court below erred in construing the Federal

Fair Practices Act as permitting states to abridge the First Amendment rights of handlers and producers.

E. The Interpretation Of The Federal Fair Practices Act Misconstrues The "Existing State Law" Provision Of That Act

The final clause of the Federal Fair Practices Act states that: "The provisions of this chapter shall not be construed to change or modify existing State law nor to deprive the proper State courts of jurisdiction." 7 U.S.C. § 2305(d). The Michigan Supreme Court indicated that this statement demonstrates a Congressional intent not fully to exercise authority in the agricultural marketing area and implied that the states were thereby given a greater latitude to legislate in the same area. *Michigan Canners, supra*, 416 Mich. at 714, 332 N.W.2d at 137. The court below misconstrued the purpose of this provision. Such a construction ignores the Congressional declaration that the Federal Fair Practices Act was intended to regulate not only interstate and foreign commerce, but commerce which may "directly burden or affect interstate commerce." 7 U.S.C. § 2301. The use of this language demonstrates Congress sought to exercise its authority under the Commerce Clause to the maximum constitutionally permitted. *See United States* v. *American Building Maintenance Industries*, 422 U.S. 271, 276, 279-81 (1975).

The "existing State law" provision was not intended to confer on the states the authority to regulate substantive conduct governed by the Federal Fair Practices Act in a manner inconsistent therewith. The legislative history discloses the purpose was merely to preserve existing state law remedies or causes of action, such as breach of contract or tortious interference with contracts – remedies which would supplement the Federal Fair Practices Act's protection of a producer's right voluntarily to contract with others free of interference. That such an interpretation is correct is confirmed by the House Committee Report accompanying H.R. 13541, the provisions of which were eventually incorporated, through amendment, into S. 109, 90th Cong., 1st Sess. (1967). In explaining the "existing State law" clause, the Report notes:

> This amendment was adopted to clarify the Committee's intent that no State law should be superceded or preempted by this legislation which is supplementary to and not in replacement of all other existing legal remedies.

H.R. Rep. No. 824, 90th Cong., 1st Sess. 4 (1967)[7]

In any event, even if the existing state law provision were construed as a Congressional intent to validate conflicting state law, the Michigan Act would still be preempted. The Michigan Act was not an "existing" state law since it was enacted four years after the Federal Fair Practices Act. Moreover, a review of the legislative history discloses discussion of only a few "existing"

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[7] The existing state law language was not added until the introduction of H.R. 13541 in 1967, which was later substantially incorporated as an amendment to S. 109. S. 109 was enacted as Pub. L. No. 90-288, 82 Stat. 93 (1968). Thus, the first bills introduced in the House and the Senate did not contain this language. H.R. 11146, 88th Cong., 2d Sess. (1964); S. 2849, 88th Cong., 2d Sess. (1964). Other bills prior to H.R. 13541 provided in part: "The foregoing provisions shall not be construed to deprive state courts of jurisdiction and actions for damages thereunder." H.R. 11146, 88th Cong., 2d Sess. (1964); H.R. 898, 89th Cong., 1st Sess. (1965); H.R. 5951, 89th Cong., 1st Sess. (1965); H.R. 4152, 90th Cong., 1st Sess. (1967); H.R. 6262, 90th Cong., 1st Sess. (1967). H.R. 13541, as introduced, merged this jurisdictional clause with an existing state law nonpreemption statement.

Similarly, the original Senate bill contained the jurisdictional provision quoted above. S. 2849, 88th Cong., 2d Sess. (1964). However, the Senate Subcommittee on Agricultural Research and General Legislation recommended that the entire jurisdictional clause be deleted from the successor bill S. 109. The Committee explained: "Some witnesses suggested that the above disclaimer was unnecessary and might be construed as authorizing double collection of damages." Staff of Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture and Forestry, 90th Cong., 1st Sess. 10 (Comm. Print. No. 2 1967). As previously noted, the "existing State law" language introduced in H.R. 13541 was incorporated as an amendment to S. 109. 114 Cong. Rec. 8418-89 (1968). *See also* 1968 U.S. Code & Ad. News 1867, 1868.

state agricultural marketing acts.[8] Not one was similar to the Michigan Act in requiring the financial participation of nonproducer association members in bargaining units and eliminating the right of nonmembers to freely negotiate the terms or the sale of their own commodities. We are unaware of any state statute in existence prior to the enactment of the Federal Fair Practices Act which contained provisions similar to the Michigan Act.[9]

[8] *Discrimination Against Members of Farmer Cooperatives: Hearings on S. 109 Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture and Forestry*, 89th Cong., 2d Sess. 153-56 (1966) (statement of Robert D. Williams, Chairman of the California Senate Standing Committee on Agriculture) (California); *id.* at 11 (statement of Charles B. Schuman, President, American Farm Bureau Legislation) (Illinois); *Agricultural Producers Marketing Act: Hearings on S. 109 Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture and Forestry*, 90th Cong., 1st Sess. 197-98 (1967) (statement of Leonard G. Kunzman, Executive Secretary, Oregon Farm Bureau Federation) (Oregon).

[9] Even today the Michigan Act appears to be unique. Although many states have enacted legislation prohibiting conduct substantially similar to that prohibited under the Federal Fair Practices Act, we are unaware of any state that has enacted a regulatory scheme requiring nonmembers of an association to financially support and be bound by the contractual terms and conditions negotiated by an association. *See, e.g.*, N.J. Stat. Ann. §§ 4:13-1, 4:13-45 (West 1973); O.R. Rev. Stat. § 646.605 (1981); Indiana Agricultural Cooperative Act, Ind. Code Ann. § 15-7-1-1 (Burns 1973).

Some states have acts similar to the Michigan Act. For example, the Minnesota Agricultural Marketing and Bargaining Act of 1973, Minn. Stat. Ann. § 17.691 (West 1981), contains language almost identical to that of the Michigan Act. However, the Minnesota Act specifically provides that an association may not bargain for those producers who choose not to be represented by the association. Minn. Stat. Ann. § 17.694 Sub. 7 (West 1981). *See also* Maine Agricultural Marketing and Bargaining Act, Me. Rev. Stat. Ann. Tit. 13, § 1953 (1973) (no financial support requirement for nonmembers).

Some states have legislation providing for marketing orders of various agricultural commodities. *See, e.g.*, N.Y. Agric. & Mkts. Law § 294 (McKinney Supp. 1982); Wisconsin Agricultural Marketing Law, Wisc. Stat. Ann. § 96.01 (West Supp. 1983). Such legislation differs greatly from the Michigan Act. The state, through a system of marketing orders, essentially controls the price of a given agricultural commodity. This is in contrast to

A comparison of the very limited language of the Federal Fair Practices Act with the broad nonpreemption provisions contained in other federal statutes provides additional support for the position that Congress did not intend to grant the states authority to regulate inconsistently with the Federal Fair Practices Act. When Congress intends to have state law supplement or override federal law, it so provides explicitly.[10]

CONCLUSION

The decision of the Michigan Supreme Court misconstrues the Federal Agricultural Fair Practices Act. The Michigan court failed to recognize that this Act explicitly protects the right of producers to refrain from cooperative involvement. In addition to the explicit provisions of the Federal Fair Practices

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the Michigan Act in which private parties, without state control, establish the price and other marketing terms and conditions. Because of this state involvement, the validity of marketing order statutes has been upheld. *See, e.g., Parker* v. *Brown*, 317 U.S. 341 (1943); *Wickham* v. *Trapani*, 41 Misc.2d 749, 246 N.Y.S.2d 137 (Sup. Ct. 1966), *aff'd*, 272 N.Y.S.2d 6, 6 A.D.2d 216 (3d A.D. 1966).

[10] *See, e.g.*, Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. § 2301, § 2311(b) (1982) ("Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law."); National Labor Relations Act, 29 U.S.C. § 151, § 164(b) (1982) ("Nothing in this subchapter shall be construed as authorizing agreements requiring membership in a labor organization as a condition of employment in any state . . . in which an exclusion . . . is prohibited by state . . . law."); Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601, § 9652(d) (1982) ("Nothing in this chapter shall affect the obligations or liabilities . . . under . . . State law, including common law. . . .").

Act, this right is protected by the Capper-Volstead Act, the Sherman Act and the First Amendment. When the Federal Fair Practices Act is properly construed, it is apparent that provisions of the Michigan Act are in direct conflict with, and thwart the purpose of, the federal legislation. Accordingly, under the Supremacy Clause, those provisions of the Michigan Act should be declared invalid.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., ET AL.,

Appellants,

v.

AGRICULTURAL MARKETING AND BARGAINING BOARD, ET AL.,

Appellees.

On Appeal from the Supreme Court of Michigan

Brief for California Tomato Growers Association, Apricot Producers of California, Olive Growers Council of California, Raisin Bargaining Association and Prune Bargaining Association as Amici Curiae Supporting Appellees

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QUESTION PRESENTED

Whether certain provisions of Michigan's Agricultural Marketing and Bargaining Act are preempted by the federal Agricultural Fair Practices Act of 1967.

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Brief for California Tomato Growers Association, Apricot Producers of California, Olive Growers Council of California, Raisin Bargaining Association and Prune Bargaining Association As Amici Curiae Supporting Appellees

Amici submits this brief in support of the Appellees Agricultural Marketing and Bargaining Board, et al. Consent to file this brief has been obtained from counsel for all parties and has been filed with the Clerk of this Court.

THE INTEREST OF THE AMICI.

The amici are agricultural bargaining cooperatives organized as nonprofit corporations under the laws of the State of California. Each acts as the exclusive bargaining representative or agent of its members. There are two types of exclusive bargaining agent arrangements. In one type, such as the California Tomato Growers Association, the Olive Growers Council and the Prune Bargaining Association, the membership agreement provides that the association is the exclusive bargaining or selling agent for the member and, as such, it has exclusive authority to establish and approve the minimum terms and conditions of sale for the product. Each member agrees not to otherwise sell or contract for the sale of his product except under such minimum terms and conditions as are fixed by the association. Here then, the association fixes the minimum price and terms of sale and the member contracts directly with the buyer.[1]

The Apricot Producers of California and the Raisin Bargaining Association represent another type of agricultural bargaining cooperative. Here the cooperative actually acts as the exclusive sales agent for its members with the authority to determine the price and terms of sale for, and to convey title to, the member's produce.[2] The member does not contract

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1 Section 3(i) of the membership agreement for the Olive Growers Council provides, in part, as follows:

> [t]he Council shall be, and is hereby designated, as sole and exclusive sales agent for such member with respect to his olives for processing. As such exclusive sales agent, Council shall have the exclusive authority and power during the term of this Agreement, without taking title to the olives, to establish and fix (including the authority to change and amend) and to approve the minimum terms and conditions of sale or of the contract of sale of all olives produced by or for member....

2 Section 2 of the membership agreement of the Apricot Producers provides, in part, as follows:

> [t]he Association is hereby authorized to and Association shall determine in its sole discretion as to the sale of signed apricots for processing and the Association is empowered *to sell* such apricots in the green, processed or dried state to such canners, freezers, firms, persons, corporations, and at such prices as the Association shall determine.... (emphasis added).

The Articles of Incorporation, Bylaws and membership agreement of the Olive Growers Council and the Apricot Producers of California are on file with the Exempt Organization Section, Internal Revenue Service, Department of the Treasury, Washington, D.C.

directly with the buyers for the sale of the produce.

In most cases the members agree that they will pay liquidated damages in the event that they violate the terms and conditions of their membership agreement.

Each of the amici is the collective bargaining representative of its grower members on a statewide basis.

Some products, such as tomatoes, are grown outside the State of California as well as within the State. However, the association represents only California growers. In many instances the products represented by bargaining cooperative associations are grown exclusively in California as is the case with apricots, cling peaches, olives and raisins. Some farm products are grown exclusively within the boundaries of other states such as hazelnuts, which are grown exclusively in the State of Oregon.

Bargaining cooperatives are a relatively new phenomenon and have developed as a result of the unequal bargaining power of the farm producer with the buyer in the marketplace. As the authors of one authoritative study concluded, "Cooperative bargaining in agriculture reflects, in large part, the structure of American agriculture... [with] a great many producers, each producing an insignificant part of the total output...."[3] Individual farmers therefore tend to accept the price offered to them when, as is commonly the case, it is offered by processors or other buyers, a small number of whom are dominant factors in the marketplace.[4]

Bargaining cooperatives early experienced difficulties in obtaining and retaining members because of opposition from processors. One commentator, who has had extensive experience as the manager of a large agricultural bargaining cooperative and as a consultant in agricultural marketing, summarized these as follows:

> Prior to the 1967 passage of S-109, the Agricultural Fair Practices Act, the efforts of many farm groups to bargain collectively were met with opposition from handlers and processors. The tactics on the part of some

3 P. Helmberger & S. Hoos, *Cooperative Bargaining in Agriculture* 1 (University of California 1965).

4 *Id.* at 6.

major buyers had more in common with the early history of unionization in the United States than in marketing farm products. For example, the Federal Trade Commission found that three major tomato-canning companies in Ohio engaged in a common boycott of the members of Cannery Growers Inc., a grower's cooperative bargaining association. Canners refused to contract with members of the association and offered 'sweetheart deals' to members who withdrew from the association. In one instance, field buyers contracted with growers provided the growers signed a form letter of resignation to withdraw from the association. One company, according to the testimony of a field buyer, proposed spending up to $100,000 to discourage the efforts of farmers to organize for bargaining purposes.

Growers in Pennsylvania and New Jersey who were identified with the bargaining associations found that their contracts were not renewed, or that they were discriminated against at the receiving docks of the canneries. Blacklisting of growers was also carried out in the broiler industry. In one area of Mississippi, organizers had to visit growers in the night, and not give receipts of dues payment. When growers attended meetings, their car license numbers were taken down by field staff and the growers were called on the next day and warned not to join the association. Growers in other states found their contracts terminated if they joined a bargaining association.

R. Bunje, *Cooperative Farm Bargaining and Price Negotiations* 13 (U.S. Dep't. of Agriculture, Cooperative Information Report No. 26, 1980)

His conclusions are consistent with evidence presented to Congress during the hearings on the bill, including the report of the Secretary of Agriculture to the Senate Committee on Agriculture and Forestry in recommending its passage. *See Report of the Secretary of Agriculture to the Senate Comm. on Agriculture and Forestry*, S. Rep. 474, *reprinted in* 1968 U.S. Code Cong. Ad. News 1867, 1874.

The Federal Agricultural Fair Practices Act of 1967, 7 U.S.C. §§ 2301-2306 (1973) (the "Federal Act"), was a result of efforts by farm producers to improve the legal climate in which their bargaining cooperatives could function. The Federal Act was patterned upon an act adopted by California in 1967 which proscribed certain conduct as unfair agricultural trade practices. *See* California Cooperative Bargaining Association Act, Cal. Agric. Code §§ 54401-54462 (as amended 1974 and 1983). The moving forces behind the legislation were the farmers and farm organizations; the only evidence of need for the legislation presented before Congress was evidence of various forms of discrimination engaged in by buyers against producers who sought to join or remain as members of bargaining cooperatives. *See* S. Rep. 474, *supra*, *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1871.

Recognizing the narrow scope and inadequate enforcement machinery of the existing state and federal acts, the State of California recently enacted amendments to its Act. Assembly Bill 1944,[5] which will become effective January 1, 1984, requires accredited bargaining associations and handlers to bargain with one another in what amounts in substance to good faith.[6]

The Appellants seek to persuade this Court to hold the Michigan Agricultural Marketing and Bargaining Act, Mich. Comp. Laws. §§290.701-.726 (Supp. 1982) (the "Michigan Act"), unconstitutional on the rationale that it is in irreconcilable conflict with the Federal Act, because the latter not only establishes the right of producers to form and join cooperative bargaining associations free from discrimination, but also "protects an individual farmer's right not to join a cooperative

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5 Act of September 27, 1983, ch. 1100, 1983 Cal. Legis. Serv. 6010 (West) (amendments to be codified at Cal. Agric. Code §§54401-54463).

6 When the amendment becomes effective, §54431 of the Food and Agricultural Code will provide that it is an unfair trade practice for a coopertive bargaining association or a processor to "refuse to negotiate or bargain at reasonable times and for reasonable periods of time with a genuine desire to reach agreement and a serious attempt to resolve differences . . . for price, terms or sale, compensation for commodities produced under contract, and other contract provisions . . . . " Act of September 27, 1983, ch. 1100, §9, 1983 Cal. Legis. Serv. 6010, 6014 (West).

association and prohibits interference with that right by processors and cooperative associations... [and] protects the right of purchasers of farm commodities to deal freely with the customers of their choice."
(Appellants Brief on the Merits 14) [hereinafter (App. Br.)]. Appellants contend the Michigan Act violates what they consider to be such protected rights.

If this Court embraces the three-policy interpretation of Appellants, the result could seriously impair the rights of states to enact legislation, such as that enacted in California, which may be desirable or necessary to effectuate the purposes of the Federal Act. Amici respectfully submit that the Michigan Supreme Court correctly recognized that the purpose of the Federal Act was to guarantee to agricultural producers the freedom to join cooperative bargaining associations in order to enhance their bargaining power, and that Congress did not intend to prohibit states from enacting legislation to implement that guarantee. Amici urge this Court to adopt the Michigan Supreme Court's reasoned analysis and uphold the Michigan statutory scheme as being consistent with the Federal Act.

ARGUMENT

I. THE MICHIGAN ACT IS NOT IN CONFLICT WITH AND THEREFORE IS NOT PREEMPTED BY THE FEDERAL ACT.

A. Congress Did Not Intend to Preclude the Right of States to Enact Legislation to Implement the Purposes and Rights Established by the Federal Act.

Appellants concede that in enacting the Federal Act, congress did not intend to preempt the entire field from state regulation.[7] The question, then, is whether the Michigan Act

7 The House Committee Report accompanying H.R. 13541 evidenced Congress' intent that "no state law should be *superceded* or *preempted* by this legislation which is *supplementary* to and not in replacement of all other existing legal reme-

stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Fidelity Federal Savings & Loan v. de la Cuesta*, 458 U.S. 141, 153 (1982). (App. Br. 11-12).

The Amicus American Frozen Foods Institute cites the Congressional declaration in Section 2301[8] that agricultural marketing and bargaining activities "directly burden or affect interstate commerce" as evidence of Congress' intent to fully exercise its authority under the Commerce Clause to the "maximum constitutionally permitted." (Amicus Brief of the American Frozen Foods Institute on the Merits 14). On this basis, the Amicus contends that the Michigan Supreme Court misconstrued Section 2305(d),[9] the "existing State Law" provision and ignored Section 2301 in determining that the Michigan Act "was a step by the Michigan legislature into a previously unregulated area". 416 Mich. at _____, 332 N.W.2d at 141.

We disagree. The Michigan Supreme Court's construction of the Federal Act recognizes that the federal government is a government of enumerated powers and that those powers not specifically granted to the federal government are reserved to the states. U.S. Const., amend. X. Under the Constitution, Congress is only empowered to regulate activities affecting interstate and foreign commerce. U.S. Const., art. I, §8, cl. 3. Therefore, Congress must assert its jurisdictional basis when invoking its Commerce Clause power to enact legislation.

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dies." H.R. Rep. No. 824, 90th Cong., 1st Sess. 4 (1967) (emphasis added). Among the available legal remedies in existence at that time were those provided for under then existing state fair practice acts. *See, e.g.*, Cal. Agric. Code §54461 (criminal penalty), §54462 (civil penalty), §54405 (injunctive relief) (enacted in 1967, *see* Act of March 15, 1967, ch. 15, 1967 Cal. Stats. 44, 610).

8 7 U.S.C. §2301 provides, in part:

> Agricultural products are produced in the United States by many individual farmers and ranchers scattered througnout the various States of the Nation. Such products in fresh or processed form move in large part in the channels of interstate and foreign commerce, and such products which do not move in these channels directly burden or affect interstate commerce.

9 7 U.S.C. §2305(d) provides, in part:

> The provisions of this chapter shall not be construed to change or modify existing State law or deprive the proper State courts of jurisdiction.

It has long been clear that Congress has the power under the Commerce Clause to reach intrastate agricultural marketing activities which affect interstate commerce. *Wickard v. Filburn*, 317 U.S. 111 (1942). However, the jurisdictional statement by Congress of its power to *reach* activities under the Commerce Clause clearly is not evidence of its intent to regulate fully *every aspect* of those activities. If we follow this argument of the Amicus to its logical conclusion, then every activity which Congress could reach under the Commerce Clause power would, by the mere exercise of that power, be preempted from state regulation. This would clearly be inconsistent with the Federal-State balance embodied in the Constitution.

Moreover, the Michigan Supreme Court's construction of the Federal Act is consistent with this court's determination that absent a *clear statement* of congressional purpose, federal legislation "will not be deemed to have significantly changed the Federal-State balance."[10] *Heublein v. South Carolina Tax Comm'n*, 409 U.S. 275, 281-82 (1972); *United States v. Bass*, 404 U.S. 336, 349 (1971). The Federal Act does not contain a clear statement of Congressional purpose which would be necessary to change that balance and to preclude action such as that taken by Michigan.

Appellants contend that although the Federal and Michigan Acts share the common goal of protecting the producers right to join a cooperative association, they have established regu-

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10 Professor Tribe notes the compelling reasons for requiring a *clear statement* of Congressional purpose.

> The rule . . . is an important complement to the political check on congressional exercise of the commerce power. Legislative coalitions need not rest on definitive compromises of conflicting interests if the legislation a coalition secures is sufficiently ambiguous. For in that case, competing interests retain a full opportunity to press their claims anew to the courts that are called upon to interpret the law. Such an outcome is unsatisfactory in the commerce clause context, however, since contemporary doctrine provides courts with no trenchant criteria for striking the balance that Congress managed to avoid. A rule like the clear statement requirement is therefore essential: Congress must be prevented from resorting to ambiguity as a cloak for its failure to accommodate the competing interests bearing on the Federal-State balance.

L. Tribe, *American Constitutional Law* §5-8 at 243-44 (1978).

latory schemes that irreconcilably conflict. (App. Br. 13). Appellants contend that the Federal Act evidences three distinct objectives, namely protection of a farmer's right to join a cooperative association, preservation of a competitive market system in which processors are free to bargain with farmers of their choice, and protection of independent farmers against compulsory cooperative membership. (App. Br. 14). The Appellants conclude that the Federal Act "created a competitive system in which associations, independent farmers, and processors would all be free from compulsion or coercion." (App. Br. 17).

Appellants rely upon Section 2304 as authority for the proposition that the Federal Act protects the rights of buyers to bargain directly with an individual producer and that state law interfering with that right is preempted.

Section 2304 of the Federal Act provides:

> *Disclaimer of intention to prohibit normal dealing.* Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association of producers.

7 U.S.C. §2304 (1973).

Appellants suggest that by indicating in Section 2304 what buyer activities were neither prevented nor required by the Federal Act, Congress evidenced its national policy of favoring the competitive free market system, thus precluding state regulation impinging on what they describe as the free market right. (App. Br. 17, 33-35, 37). However, the very nature of any economic regulation is an encroachment on the free market system. In fact, in proscribing certain conduct by handlers in their relationship to producers, the Federal Act substantially modifies the free market system.

Nonetheless, state economic regulation affecting the free market system is allowed in many areas also subject to federal legislation. In the antitrust area, for instance, this Court has held that the national policy favoring free competition in busi-

ness is an insufficient basis from which to infer a Congressional intent to preempt states' statutes having an adverse effect on competition. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132-33 (1978). "[F]or if an adverse affect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." 437 U.S. at 133.

It is clear from the Federal Act's statutory scheme that Congress recognized that only the right to join and bargain collectively through a cooperative would provide producers with any meaningful economic bargaining power. It hardly follows, as Appellants argue, that Section 2304 evidences Congress' intent to *preclude* state action to effectuate and implement the producers federally-created right to join and bargain through cooperatives. As the Michigan Supreme Court noted, Section 2304 is "simply a statement indicating that the [Federal Act] did not promulgate an exclusive bargaining system for marketing a producer's agricultural commodity." 416 Mich. at _____, 332 N.W.2d at 139.

Similarly, for reasons discussed more fully below, (see Section I. C. 2 .), Section 2303 does not evidence a clear statement of federal purpose from which an intent to preempt may be inferred. In Section 2303, Congress manifested only its prohibition of *wrongful* conduct. It cannot fairly be inferred from this that Congress intended to preempt state statutes which require an individual producer to join or be subject to the terms of an association of producers when necessary to protect the rights of all producers.

In promulgating the Federal Act, Congress in effect recognized that agricultural marketing and bargaining is traditionally an area of state concern. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963). The method of agricultural bargaining is largely dependent upon the nature of the crop or crops produced.[11] In some states a crop is pro-

11 *See* R. Bunje, *Cooperative Farm Bargaining and Price Negotiations* 45-52 (U.S. Dep't. of Agriculture, Cooperative Information Report No. 26, 1980); P. Helmberger & S. Hoos, *Cooperative Bargaining in Agriculture*, *supra* note 3, 11, 39-43.

duced exclusively within its boundaries, and state legislation tailored to meet special concerns may be appropriate. In fact, since enactment of the Federal Act, many states have adopted fair practice legislation to implement the rights established by the Federal Act.[12] The Michigan Act is but one example of a valid state statue regulating agricultural bargaining.

B. The Purpose of the Federal Act was to Protect the Rights of Producers to Join and Bargain Collectively Through Cooperatives.

The purpose of the Federal Act was to enhance the bargaining power of farmers by establishing their right to join and bargain collectively for the sale of their produce through bargaining cooperative associations without fear of reprisal or discriminatory conduct toward them by buyers for exercising that right.

This purpose is manifest in the statement of Congressional findings:

> The efficient production and marketing of agricultural products by farmers and ranchers is of vital concern to their welfare and the general economy of the Nation. Because agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together volunarily in cooperative organizations, as authorized by law. Interference with this right is contrary to the public interest and adversely affects the free and orderly flow of goods in interstate and foreign commerce.

7. U.S.C. 2301 (1973).

It is evident from the genesis and history of the Federal Act that the aim of Congress was elimination of the discriminatory behavior on the part of processors. Indeed, the *only evidence*

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12 *See, e.g.*, Indiana Agricultural Cooperative Act, Inc. Code Ann. §§15-7-1-1-33 (Burns 1973); Maine Agricultural Marketing and Bargaining Act, Me. Rev. Stat. Ann. Tit. 13, §§1953-1965 (1973); Minnesota Agricultural Marketing and Bargaining Act, Min. Stat. Ann. §§17891-.701 (West 1983); Oregon Producer's Cooperative Bargaining Associations Act, O.R. Rev. Stat. §§646.515-.545 (1981).

before Congress related to the abuses and discriminatory acts of buyers against producers who sought to join and bargain through their cooperatives. *See* S. Rep. 474, *supra, reprinted in* 1968 U.S. Code Cong. & Ad. news 1867, 1871.

The Michigan Supreme Court clearly recognized this Congressional purpose in upholding the constitutionality of the Michigan Act. The history of the Federal Act provides ample proof of this legislative purpose. The report of the Secretary of Agriculture to the Senate Committee on Agriculture and Forestry in recommending passage of the Federal Act states in part:

> It is essential to protect the rights of producers to join together in cooperatives to perform necessary marketing operations, including bargining with processors and other buyers over the terms of sale of the producers' farm products....
>
> The proposed bill would materially strengthen farmers' ability to bargain and market effectively. It will reaffirm the right of producers to join together and operate cooperatives without interference. It will remove some of the impedimets confronting producers in organizing and operating their cooperative association.
>
> Producers have suffered harrassment and reprisal by some processors because of activity in organizing and joining a cooperative. Grower contracts have been canceled or reduced in volume. Processors have offered inducements to growers not to join a cooperative. Attempts have been made to buy off the cooperative's leaders to create dissention in the organization.
>
> Processors operating in several production areas have coerced growers desiring to form a bargaining cooperative by threatening to leave the cooperative's territory and expand operations elsewhere. Growers have failed to get redress after such quesitonable processor actions.
>
> If this bill were enacted, many producers who fear harassment or discimination would feel free to join a cooperative association. It would help producers use

cooperatives as a more effective tool in marketing their products.

Report from the Secretary of Agriculture to the Senate Comm. on Agriculture and Forestry, S. Rep. 474, *supra, reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1875.

The Michigan Supreme Court correctly concluded that the Federal Act was not, as Appellants contend, "designed . . . to accomplish three distinct goals". (App. Br. 13). Rather the Federal Act was designed by Congress as a remedial measure. The legislative history makes clear that the purpose of the Federal Act was to correct an *imbalance*—by eliminating the impediments to the formation of cooperative associations and alleviating the disparity in economic bargaining power which existed between the individial producers and their buyers.

C. The Michigan Act Is Consistent with and Does Not Conflict with the Purpose or Provisions of the Federal Act.

1. The Federal Act Does not Create or Protect a Federal Right in Buyers to Bargain Directly With an Individual Producer.

Under the Michigan Act, an accredited association is the exclusive bargaining representative of all producers in the bargaining unit for the purpose of bargaining with buyers. Mich. Comp. Laws §290.713 (Supp. 1982). The Michigan Act makes it an unfair trade practice for a buyer to refuse to bargain with an association if the buyer has had previous, substantial dealings with the association or with the producers included in the bargaining unit; individual negotiations with producers are prohibited once the association is designated as exclusive bargaining representative. Mich. Comp. Laws §290.704(1)(g),(h)(Supp. 1982).

Appellants contend that the Michigan Act compels the buyer to bargain with cooperatives which violates the purposes of the Federal Act. (App. Br. 35). In essence, Appel-

lants argue that in Section 2304 Congress protected the right of buyers to bargain with individual producers of their choice and that the Michigan Act destroys that right.[13]

We believe that the Michigan Supreme Court correctly interpreted Section 2304 as being merely explanatory of the limits upon the Federal Act. Section 2304 neither creates nor protects substantive rights.

> We do not discern from a provision termed a "disclaimer of intention" a positive congressional intent to prohibit the conduct said not to be regulated. There is no logical nexus between a provision declaring "this is what we did not do" and the conclusion that "what we did not do, cannot therefore be done." Section 2304 is nothing more than an explanation of what [the Federal Act] was not intended to do. It did not, in disclaiming any "Intention to prohibit normal dealing," thereby create or affirmatively protect an individual handler's right to bargain with any producer, or an individual producer's right to bargain for himself. It is simply, aside from the disclaimer, neutral on *that* point. Section 2304 cannot fairly be read as a statement of congressional intent to prohibit exclusive bargaining by producer associations. It is simply a statement indicating that [the Federal Act] did not promulgate an exclusive bargaining system for marketing a producer's agricultural commodity.

416 Mich. at ____, 332 N.W.2d at 138-39.

Appellants suggest that the language and legislative history of the Federal Act demonstrate Congress' intent to preserve the free market system, in which processors would not be

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13 In their Brief on the Merits, Appellants cast their argument in terms of the buyer's right not to be compelled to deal with an association of producers. (App. Br. 35). In their Jurisdictional Statement, they cast the argument in terms of the buyer's right to be free to bargain with individual producers of the buyer's choice, including individual producers who are members of the associations. (Appellants Jurisdictional Statement 18-22). The arguments are essentially the same, for if a buyer cannot be compelled to bargain with an association of producers, then it follows that he is free to bargain with those individual producers he desires, including association members.

forced to deal with cooperatives. (Ap. Br. 31). They characterize the language of Section 2304 as limiting *cooperative* power, by denying to cooperatives the power to compel producers to bargain with them. (*Id.*)

Appellants derive their analysis from Section 2303, which addresses only handler dealings with "producers," a term that does not include associations, *see* 7 U.S.C. §2302(b), and Section 2304, which states that nothing in the Federal Act "require[s] a handler to deal with an association of producers." 7 U.S.C. §2304. Appellant's interpretation of these sections is inconsistent with the basic purpose of the Federal Act.

A bargaining cooperative is, by definition, a cooperative through which members bargain collectively for price and terms of sale of its members produce.[14] Implicit in the right to join such a cooperative is the right to bargain through it, or the right to join is meaningless. If the Federal Act were interpreted to provide that a buyer cannot be compelled to bargain with an association and has an absolute right to bargain directly with an individual producer, even one who has appointed the association as his designated agent, then the purpose of the Federal Act would be frustrated upon formation of the cooperative.[15] Producers who join a cooperative would thus be left without any means of achieving the effective economic bargaining power the Federal Act sought to establish.[16]

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14 R. Bunje, *Cooperative Farm Bargaining and Price Negotiations*, *supra* note 11, at 1.

15 The Amicus for the National Food Processors describes the "principal thrust" of the Federal Act to be prevention of handler interference with the *formation* of cooperative associations. (Amicus Brief for National Food Processors on the Merits 24). The Amicus characterizes formation as a two step process—1) creation of the organization and 2) designation of the association as exclusive bargaining agent. It contends that only the first step in the process is protected, once the second step occurs the cooperative members lose their protected status. This analysis ignores the fact that such an association normally does not have the authority to function unless it has the requisite number of members who have signed membership agreements designating the association as their exclusive bargaining agent. See notes 1 and 2.

16 The legislative history reflects Congress' intent that such a situation not occur. "The fact is clear that an association of producers which has obtained the voluntary membership of a large number of farmers deserves *respect* and *recognition* by the handler of the agricultural products." Senate Report 474, *supra*, *reprinted* in 1968 U.S. Code Cong. & Ad. News 1867, 1873 (emphasis

What is lost in Appellants construction of the Federal Act is the fact that a cooperative is, after all, only the aggregate of its individual members, for whose protection the Federal Act was adopted. We concur with the Solicitor General's statement that, "[t]he obligation, such as it is, to deal with an association appointed by a producer as his agent arises from the voluntary act of the *producer*, coupled with prohibition of discrimination against a producer 'because of his membership in or contract with an association.' (7 U.S.C. 2303(b))." (Solicitor General's Brief on the Merits 12 n.5) [hereinafter (Sol. Gen. Br.)]. (emphasis added).

Moreover, if a buyer has a federal right to negotiate directly with an individual producer, even one who has voluntarily appointed an association as his designated agent, then Congress has mandated a system whereby a buyer is free to induce such a producer to contract with him despite the fact that in many instances such direct dealing by the producer would be in violation of his membership agreement. *See Butz v. Lawson Milk Co.*, 386 F. Supp. 227, 237 (N.D. Ohio 1974).[17]

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added). *See also* 114 Cong. Rec. 7464 (1968) (remarks of Rep. Sisk) ("Certainly we want to avoid the interpretation that the legislation intends to encourage circumvention of a properly constituted marketing or bargaining association.").

17 With many cooperatives, under the terms of the membership agreement, the member agrees that only the cooperative has the authority to execute a contract with the buyer for the sale of his produce. The member agrees that he will be subject to legal action by the cooperative, such as liquidated damages, if he violates that committment. *See* R. Bunje, *Cooperative Farm Bargaining and Price Negotiations*, *supra* note 11, at 45-46. Cooperatives of this type include the California Canning Peach Association, Apricot Producers of California, and Raisin Bargaining Association.

Similarly, when the association does not contract for the members, but acts as the exclusive bargaining agent with the authority to determine minimum price and terms of sale, the member agrees that he will be subject to legal action by the cooperative, and often a liquidated damage provision is included in the membership agreement. *Id.* at 46-47. Cooperatives of this type include the California Tomato Growers Association, Olive Growers Council and Prune Bargaining Association.

The ability of the bargaining cooperative to function effectively depends upon its ability to honor legal commitments which it undertakes with the buyers with which it contracts on behalf of its members. Consequently, the enforcement of the members' obligations to the cooperative is essential if the cooperative is to function effectively. Failure of members to comply with the terms of their membership agreements and to support the organization affects all members of

Simimlar Congressional legislation demonstrates that when Congress intends to balance competing interests in the creation or protection of economic rights, it does so in an affirmative manner, not by inference or implication. For example, the balance structure of the National Labor Relations Act, as amended, 29 U.S.C. §§151-168 (1973) (the "NLRA"), exemplifies a compromise struck between competing concerns. In the NRLA, Congress specified those labor activities of employees which were to be protected, 29 U.S.C. §157, and those labor activities of *both* management and labor organizations which were to be prohibited, 29 U.S.C. §158. By this statutory scheme, Congress created an affirmative declaration of rights and restrictions on all interests and struck a "balance . . . between the uncontrolled power of management and labor to further their respective interests." *Carpenters Local 1967 v. N.L.R.B.*, 357 U.S. 93, 100 (1958).[18]

The statutory scheme of the Federal Act manifests no similar comprehensive and balanced structure. Under Section 2303, Congress affirmatively protected the right of producers to join and bargain through cooperatives by prohibiting certain discriminatory acts by buyers. But, Section 2304 "protects" the rights of buyers only by negative inference. Section 2304 provides that "[n]othing in this chapter shall prevent handlers and producers from selecting their customer and suppliers . . . nor require a handler to deal with an association of producers." 7 U.S.C. §2304. Yet, to be consistent with Sec-

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the cooperative. *Id.* at 76-78. *See also* P. Helmberger & S. Hoos, *Cooperative Bargaining in Agriculture*, *supra* note 3, at 35-39.

An interpretation the Federal Act that protects a buyer's right to bargain directly with individual association members would disrupt this essential characteristic of the bargaining association and would frustrate the intended purpose of the Federal Act. Moreover, such an interpretation would also interfere with the rights of other buyers who choose to contract with the bargaining association, because those buyers would have no guarantee that the bargaining cooperative members would honor their committments to provide produce to the buyers.

18 It is true that the preemption doctrine can apply to state regulation of activities neither arguably protected nor prohibited under the NLRA— activities intentionally left unregulated on the basis of a Congressional determination that such should be left to the free-market forces. Nevertheless, the basis for such preemption is the comprehensive and balanced structure of the statutory scheme. *See Machinists v. Wisconsin Employment Relations Committee*, 427 U.S. 132, 148-51 (1976).

tion 2303, and the NLRA scheme, the language of Section 2304 should have prohibited an association of producers from "requiring a buyer to deal with it" or "inhibiting a buyer's rights to deal with individual members of the association." Obviously, this is not what Section 2304 says.[19]

It is illogical to conclude that when faced with such clearly competing interests, Congress enacted a statutory scheme which manifests a clear statement of the rights of producers to bargain collectively in Section 2303, and yet leaves to inference the rights of buyers it is also alleged to protect in Section 2304. A more logical explanation is that adopted by the Michigan Supreme Court. Section 2304 is nothing more than it purports to be—a "Disclaimer of Intention"—a statement by Congress of what it did *not* do in creating the Federal Act.

2. The Federal Act Does Not Afford a Producer an Absolute Right to Bargain Directly With a Handler but Protects Him from Being Unduly Influenced by a Handler in Deciding Whether or Not to Join a Cooperative Bargaining Association.

Appellants contend that the "Federal Act protects an individual farmer's right not to join or to bargain through a cooperative and the Michigan Act destroys this right." (App. Br. 19). Appellants suggest that the Michigan Supreme Court erroneously concluded that the Federal Act did not create or protect such a right. (App. Br. 26). We believe this contention misconstrues the holding of the Michigan Supreme Court and the purpose and language of both the Federal Act and the Michigan Act.

The Michigan Supreme Court clearly recognized that under

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19 Inasmuch as Appellants characterize Section 2304 as a statement of Congressional intent to preserve the competitive market system (App. Br. 35), it is interesting to note that Congress' statement is incomplete, at least as to the rights of individual producers. With regard to those rights, Section 2304 provides: "[n]othing in this chapter shall prevent... producers from selecting their customers.... " 7 U.S.C. §2304. This language is meaningless.

We think it curious that, after "years of congressional debate" (App. Br. 35), Congress could not create a coherent statement of rights within Section 2304, a section which Appellants contend manifests a "deliberate balancing of competing interests.... " (App. Br. 31).

the Federal Act a producer had a right to join or to refrain from joining an association of producers. *See* 416 Mich. at ___ n. 13, 332 N.W.2d 139-140 n. 13. The Michigan Supreme Court's emphasis, however, was on the fact that the primary purpose of Congress in enacting the Federal Act, and of Michigan in enacting the Michigan Act, was to protect a farmer's right to join a cooperative association and to bargain collectively through that association free from handler coercion. The Court therefore correctly concluded that while a producer has a right not to join an association, "[s]ubsection (a) [of Section 2303] does not afford an *absolute* right to a producer to deal directly with a handler." 416 Mich. at ___, 332 N.W.2d at 139. (emphasis added). The extent to which the individual producer's right to deal directly with a buyer exists under the Federal Act must be understood in the context of the entire Act and its purpose.

The Solicitor General concedes that the principal thrust of the Federal Act is to protect producers from coercion in the exercise of their right to join or remain as members of a bargaining cooperative. (Sol. Gen. Br. 6). He further concedes that Congress did not attempt to create a comprehensive statement of the bargaining rights of producers and buyers in the Federal Act. (*Id.*). *See* 114 Cong. Rec. 7453-7454 (1968) (remarks of Rep. Poage); *id.* at 7456 (remarks of Rep. May). He concludes, however, that the Federal Act intended to protect individual producers from *any sort* of compulsion by cooperative associations and that the Michigan Act "frustrates the 'purposes and objectives' of the [Federal Act]" and is therefore unconstitutional. (Sol. Gen. Br. 6). We take issue with this interpretation of the Federal Act and therefore his conclusion.

We agree that the term "handler" as used in Section 2303 includes associations of producers as well as buyers and, further, as the Michigan Supreme Court also concluded, the right of producers not to join such associations is covered by Section 2303(a).

We contend that the Solicitor General overlooks the basic premise of the Federal Act and the context in which reference

is made to the right of an individual producer to join or not to join an association. Subsection (a) is one of a series of types of conduct by handlers which is proscribed by Section 2303. Subsection (a) prohibits *coercion* of a producer in the exercise of his right to join or refrain from joining an association of producers. What is meant by "coercion" is illustrated by the nature of the other types of handler conduct which are proscribed under Section 2303; for example, subsection (b) applies to *discriminatory* acts against a producer because of his membership in or contract with an association; and in subsection (c) coercion is equated with *intimidating* a producer with respect to certain acts. The character of the prohibited acts is clear; the statute is aimed at *wrongful* conduct which compels a producer to join or refrain from joining an association.

The legislative history supports this analysis. The Senate Report notes that the prohibitions of Section 2303 are intended to prevent the exercise of "*improper* pressure" upon an individual producer in compelling him to join or not to join an association. *See* S. Rep. 474, *supra*, *reprinted in* 1968 U.S. Code Cong. & Ad. News 1867, 1871. The legislative history is replete with examples of wrongful conduct by buyers, which, as discussed above, (see Section I.B.), lead to the introduction of the Federal Act before Congress. It is important, again, to note that the legislative history relates only to wrongful conduct by processors and other buyers.

The quotation from Representative Sisk's testimony explaining why the House of Representatives deleted the phrase "association of producers" from Section 2303, cited by the Appellants and the Solicitor General, demonstrates the intent of Congress that there be no implication in the Federal Act that there had been any evidence of past wrongdoing by bargaining cooperatives. He testified that the "phrase is redundant and could be misconstrued as unfairly pointing the finger of accusation to associations of producers." 114 Cong. Rec. 7464 (1968). (App. Br. 21). (Sol. Gen. Br. 9). As we observed earlier, no evidence was presented before the House or the Senate of coercion on the part of associations of producers toward producers or processors. Thus, Congress was not

concerned about misconduct by bargaining associations when the Federal Act was adopted. The reference to the right of producers not to join such associations was included only on the argument by some that it was logical to do so. *See* S. Rep. 474, *supra*, *reprinted in* 1968 Code Cong. & Ad. News 1867, 1871.

If then the Federal Act proscribes only *wrongful* conduct by handlers, and it does not purport to make a comprehensive statement of rights of producers or buyers, how, then, does the Michigan Act conflict with the Federal Act?

The Michigan Act is essentially enabling legislation pursuant to which a majority of producers in a given bargaining unit may elect to establish a bargaining association as an exclusive bargaining agent for the producers in that unit. Mich. Comp. Laws §§290.707, 290.710 (Supp. 1982). No producer is required to join the association, but the Michigan Act does require that nonmember producers be bound by the terms established by the association and must financially support the association. Mich. Comp. Laws §§290.710(1), 290.713(1) (Supp. 1982).

Insofar as a producer who does not wish to join an association is limited in his right to bargain directly with his buyers, this limitation results from the action of a majority of the producers in his bargaining unit, not from the action of the association or, for that matter, the state.[20] Two important consequences arise from this fact. First, inasmuch as the "pressure" to join the association comes from the majority of

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20 Appellants argue that states may enact laws which have effects contrary to federal law only if Congress so ordains, citing *Parker v. Brown*, 317 U.S. 341 (1943), and cases following. (App. Br. 27). Appellants further contend that "the immunity from preemption created by *Parker v. Brown* is only for true state action... [and] [i]ndividual anticompetitive action, even if authorized, approved, encouraged, or directed by the state, is not exempt." (App. Br. 28-29). *See also California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). The Michigan Act, they contend, does not fall within this limited exemption from preemption.

This argument begs the essential questions, namely whether the Michigan Act is indeed contrary to and preempted by the Federal Act. Appellants cannot bootstrap their argument by the use of circuitous reasoning. It is unnecessary to reach the issue of whether the Michigan Act falls within the *Parker v. Brown* exemption. That issue is simply not before the Court in this case.

producers and not the association, it is not action by a "handler" and therefore does not fall within the prohibitions of Section 2303(a). Second, and more important, the "pressure" which compels a producer to join an association, or be bound by its terms, is not the type of conduct which Congress envisioned would be prohibited by Section 2303. It is not *improper* pressure, of a character similar to the acts of intimidation and discrimination practiced by buyers, which resulted in passage of the Federal Act. Rather, it is *proper* pressure, necessary to protect the rights of *all* of the producers in the bargaining unit.

It is of course true that the producer who prefers not to join an association is affected by the exercise by producers of the enabling authority provided in the Michigan Act. This, however, is simply the approach adopted by one state to implement the basic purpose of the Federal Act; as pointed out, others have adopted different approaches, as is the case in California.

The crucial point is that Congress did not attempt to make a comprehensive statement of rights, it did not attempt to adopt a scheme by which its purposes could be implemented, and perhaps of most importance, in proscribing certain wrongful conduct, it did not declare what a *state* could *not* do.

CONCLUSION

The Federal Act was promulgated for the purpose of establishing and protecting the right of farm producers to bargain collectively through a bargaining association free from reprisal. Congress, in adopting the Federal Act, did not adopt a comprehensive plan for implementing and effectuating that right nor did Congress express an intention that the States would be precluded from adopting such a plan.

No Congressional intention to preempt can reasonably be inferred from the language in Section 2304, a provision which was included to clarify the limits of the Federal legislation. Nor can such Congressional intention be fairly inferred from Section 2303 which proscribes wrongful conduct, not actions of

the type authorized by the Michigan Act.

Amici respectfully submits that the Michigan Act creates no irreconcilable conflict with the Federal Act. Preemption of the Michigan Act is not warranted and the decision of the Michigan Supreme Court should be upheld.

December 29, 1983

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No. 82-1577

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., *et al.*,

Appellants,

v.

AGRICULTURAL MARKETING AND BARGAINING BOARD, *et al.*,

Appellees.

On Appeal from the Supreme Court of Michigan

BRIEF FOR NATIONAL FOOD PROCESSORS ASSOCIATION AS AMICUS CURIAE SUPPORTING APPELLANTS

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On Appeal from the Supreme Court of Michigan

BRIEF FOR NATIONAL FOOD PROCESSORS ASSOCIATION AS AMICUS CURIAE SUPPORTING APPELLANTS

Amicus submits this brief in support of the appellants Michigan Canners and Freezers Association, Inc., *et al.* Consent to file this brief has been obtained from counsel for all parties and has been filed with the Clerk of this Court.

INTEREST OF AMICUS

The National Food Processors Association ("NFPA") is a national nonprofit trade association representing almost 600 members, who pack in their commercial processing plants the majority of the national production of processed-prepared fruits, vegetables, meats, specialties and fish. These processors typically contract in advance with growers for delivery of the commodity immediately

after harvest at prices and other terms negotiated either directly with the growers or through an agricultural bargaining association. Many NFPA members are located or do business in Michigan, and are therefore vitally interested in this Court's determination whether the Michigan Agricultural Marketing and Bargaining Act (the "Michigan Act") is preempted by the Federal Agricultural Fair Practice Act of 1967 ("the Federal Act").

NFPA and its predecessor association, the National Canners Association, have participated for many years in the deliberation of proposed legislation regulating the business relation between those who grow agricultural commodities and those who purchase these products for processing. The Association was deeply involved in the intense and protracted debates leading to the enactment of the Federal Act, and subsequently participated in debates concerning proposed federal legislation that would have amended the Federal Act to require compulsory bargaining between purchasers and associations of growers.[1] NFPA has also cooperated with regional food processor associations with respect to proposed state legislation affecting grower-processor relations. The Michigan Act is one of a number of proposed or existing state laws affecting these relations, but it is the only state law that designates accredited associations as exclusive bargaining agents for all producers, members and nonmembers alike.

SUMMARY OF ARGUMENT

The Federal Act protects both an individual agricultural producer's right to decide not to join a cooperative association and instead to bargain directly for the sale of his commodities, and a purchaser of agricultural commodities' right to deal directly with individual producers

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[1] *See* Hearings on H.R. 348 *et al.* Before the Subcomm. on Domestic Marketing and Consumer Relations of the House Comm. on Agriculture, 92nd Cong., 1st Sess. (1971).

and not with cooperative associations. The Michigan Act destroys these rights. The Michigan Act binds each producer in a bargaining unit to the terms of the contracts entered into by the association in his area, and forces each producer to pay fees to the association. The Michigan Act requires purchasers of agricultural products to bargain with associations, and forbids purchasers of agricultural commodities from dealing or negotiating directly with an individual producer. Because of these conflicts, the Michigan Act is preempted by the Federal Act.

ARGUMENT

I. THE MICHIGAN ACT IS PREEMPTED BECAUSE ITS REGULATION OF THE PRODUCER-ASSOCIATION RELATION CONFLICTS WITH THE FEDERAL ACT.

There is no dispute over the operation and effect of the Michigan Act. The Michigan Act establishes a state agricultural marketing and bargaining board that accredits cooperative associations formed by producers of agricultural commodities. Mich. Comp. Laws §§ 290.703, 290.707, 290.715. An association is accredited if it has marketing and bargaining contracts with more than 50% of the producers in a defined bargaining unit. These contracts must also include more than 50% of the commodity produced in the bargaining unit. *Id.* § 290.707(c).

Once accredited, the association is the exclusive bargaining agent for all producers in the bargaining unit. *Id.* §§ 290.710(1), 290.713(1). All producers in the bargaining unit are bound by the terms of the association's contracts with "handlers",[2] and all producers must pay a

[2] The Michigan Act defines "handlers" to include, *inter alia*, all persons engaged in the business of acquiring agricultural commodities from producers or associations for processing or sale, and all persons engaged in the business of handling, storing or processing agricultural commodities received from producers or associations. Mich. Comp. Laws § 290.702(g). Unlike the Federal Act, which

service fee to the association, whether or not they belong to the association. *Id.* §§ 290.710(1), 290.713(1).

Once an association has been accredited, the Michigan Act prevents all member and nonmember producers (1) from deciding not to sell their production exclusively through the association, (2) from negotiating with processors for the sale of their own production, and (3) from deciding for themselves to whom they will sell what quantities at what prices. If this statutory scheme stands as an obstacle to the accomplishment of the purposes and objectives of the Federal Act, or makes compliance with both the Federal and Michigan Acts impossible, then the Michigan Act is preempted. *Federal Fidelity Savings & Loan Ass'n* v. *de la Cuesta*, 102 S.Ct. 3014, 3022 (1982); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).[3]

A. The Michigan Act's Regulation of the Producer-Association Relation Stands As an Obstacle to the Accomplishment of the Purposes and Objectives of the Federal Act.

The listing of prohibited practices in section 4 of the Federal Act makes it unlawful for—

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includes associations of producers in the definition of "handlers" (*see* p. 5 *infra*), the Michigan Act excludes associations from the definition of "handlers."

[3] The branch of preemption doctrine that invalidates state laws that touch upon areas reserved exclusively to federal regulation is not implicated here, since the Federal Act states that it does not "change or modify existing State law." 7 U.S.C. § 2305(d). As the Michigan Supreme Court recognized, however, this provision of the Federal Act does not resolve the issue presented in this case, since the Michigan Act was not passed until four years after the Federal Act. *Michigan Canners and Freezers Ass'n* v. *Agricultural Marketing and Bargaining Board*, 416 Mich. 706, 332 N.W.2d 134, 137 (1982). No other federal statute has been found which describes its effect on "existing state law," but the U.S. Code heading to a section in another federal agricultural law (7 U.S.C. § 269) refers to its effect on the "operation of existing laws," and the text provides that the statute does not limit the operation of laws "now in force".

> any handler . . . [t]o coerce any producer in the exercise of his right . . . to refrain from joining or belonging to an association of producers . . . or . . . [t]o coerce or intimidate any producer to enter into . . . a marketing contract with an association of producers or a contract with a handler . . . . 7 U.S.C. § 2303(a), (c).

Because the term "handler" in the Federal Act includes an association of producers,[4] this section prohibits an association from coercing any producer to join the association, to enter into a marketing contract with the association, or to enter into a contract with a handler.

These federal prohibitions against association coercion of producers contrast sharply with the provisions of the Michigan Act. Although a number of the prohibited practices listed in the Michigan Act are identical to those in section 4 of the Federal Act, the former includes no prohibitions against association coercion of producers.[5] On the contrary, the Michigan Act provides that an accredited association "shall represent all producers, members and nonmembers alike, who are in the bargaining unit and act as exclusive sales agents for the bargaining unit in negotiations with handlers," and "is the exclusive representative of all producers in the bargaining unit for the purpose of bargaining with all handlers that purchase the agricultural commodity produced in the bargaining unit." Mich. Comp. Laws §§ 290.710(1), 290.713(1). The negotiations by the association on oe-

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[4] 7 U.S.C. § 2302(a)(3), (c), (d); *see also Butz v. Lawson Milk Co.*, 386 F. Supp. 227, 235 (N.D. Ohio 1974); *Marketing Assistance Plan, Inc.* v. *Associated Milk Producers, Inc.*, 338 F. Supp. 1019, 1024 (S.D. Tex. 1972).

[5] The provisions in the Michigan Act prohibiting certain handler activities, including coercion of producers (Mich. Comp. Laws § 290.704(1)), do not apply to associations, since the term "handler" is defined in that Act to exclude associations. *Id.* § 290.702(g). The separate prohibitions applicable to associations do not include coercion of producers. *Id.* § 290.704(2).

half of all producers includes "all terms relative to trading between handlers and producers," such as the prices, quality, and quantity of the commodity sold by each producer to each handler. *Id.* § 290.713(1)(a)-(d). The Michigan Act also requires nonmembers of the association to pay a service fee to the association.[6]

In sum, although the Michigan Act does not technically compel the producer to join an association, it binds him to the association's marketing contracts, forces him to pay fees to the association, precludes him from selling his products except through and at terms prescribed by the association, and forbids him as a practical matter from negotiating with handlers. These requirements are wholly inconsistent with the Federal Act's preservation of a producer's right not to join or belong to an association, and not to enter into a marketing agreement with the association. The Michigan Act cannot be reconciled with either the specific prohibitions of the Federal Act or with its stated purpose of preserving the freedom of producers "to join together voluntarily in cooperative organizations." 7 U.S.C. § 2301.

The legislative history of the Federal Act confirms that the Act's purposes and objectives are frustrated by the Michigan Act. Senator Aiken of Vermont introduced the first bill relating to the relationship between producer organizations and handlers on which hearings were held. S. 109, 89th Cong., 1st Sess., Hearings on S. 109 Before the Subcomm. of the Senate Comm. on Agriculture and Forestry, 89th Cong., 2d Sess. 1-2 (1966) ("June 1966 Hearings"). That bill prohibited "any processor, handler,

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[6] Mich. Comp. Laws § 290.710(1). Moreover, while the Michigan Act does not expressly make it unlawful for a producer in the bargaining unit to negotiate directly with a handler, the state law does prohibit a handler from negotiating with a producer. Mich. Comp. Laws § 290.704(1)(h). The Michigan Act thus eliminates, as a practical matter, any direct dealing between a producer in an accredited bargaining unit and a handler.

distributor, dealer, or agent thereof . . . who purchases or contracts to purchase an agricultural commodity from a producer . . . knowingly to . . . [i]nterfere with, restrain, coerce, or boycott any agricultural producer in the exercise of his right to join and belong to an association of producers of agricultural products . . . ." The bill did not provide any definition of the term "handler."

Even the supporters of this early bill recognized the importance of maintaining the right of individual producers not to join an association and to bargain individually for the sale of their commodities. Senator Lausche, one of the co-sponsors of the bill, emphasized that:

> [*I*]*t should be the farmer who decides whether or not to belong to such an association.* S. 109 does not attempt to make this decision for him. I do not believe that government should make this decision for him. *Membership should be voluntary.* (June 1966 Hearings at 6) (emphasis added).

However, the bill on its face contained no protection for the right of a producer to refrain from joining an agricultural association and to bargain individually. That shortcoming was the focal point of the testimony of numerous witnesses and commentators, as exemplified by the testimony of the Texas Independent Ginners Association that the bill "fails, wholly, to guarantee the right not to join an association of producers of agricultural products," and that the bill should "guarantee that the farmer may remain a free agent." June 1966 Hearings at 146.[7]

Despite these strong endorsements of express protection for the right of producers to decide not to join a producer association, the substitute amendment proposed by Senator Aiken that was the subject of the next round

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[7] *See also* June 1966 Hearings at 134 (testimony of Independent Cotton Industries Association) ("it is equally important to safeguard the freedom of the farmer not to join such cooperatives . . ."); June 1966 Hearings at 41 (testimony of National Livestock Feeders Association).

of hearings did not address this concern. The bill continued to protect only the producer's right to join an association, and not his right to refrain from joining.[8] The bill also provided that the prohibitions established by the bill would only apply to "handlers," which was defined then to exclude associations of producers.[9]

The absence of any protection in this substitute bill for the producer's right not to join an association met with strong opposition. Groups such as the National Livestock Feeders Association stressed that it was as important to provide "for the protection of individual freedom of choice on the part of agricultural producers as it is to protect their right of organized activities in their behalf," and urged that "an addition be made to S. 109 providing comparable legal protection for individual producers or groups of producers who choose *not* to join or *not* to belong or associate with a given group or association . . ." (Sept. 1966 Hearings at 222).[10]

S. 109 was not reported out of Committee in the Eighty-ninth Congress. In the Ninetieth Congress S. 109 was re-introduced in an amended form. The exemption of agricultural associations from the definition of "handlers" was deleted, so that the prohibition against inter-

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[8] Amendment 933 to S. 109, 89th Cong., 2d Sess. § 4, Hearings on a Substitute Amendment to S. 109 Before the Subcomm. of the Senate Comm. on Agriculture and Forestry, 89th Cong., 2d Sess. 175-77 (1966) ("Sept. 1966 Hearings").

[9] *Id.* § 3(a).

[10] *See also* Sept. 1966 Hearings at 206 (testimony of Texas Independent Ginners Association) ("[t]he proposed amendments to S. 109 wholly fail to guarantee the right of an individual producer of agricultural products not to join an association of producers"); Sept. 1966 Hearings at 195 (testimony of National Canners Association) (the bill "should also, in the interest of justice and fair play, impose similar restrictions on bargaining associations, in order to protect the rights of the canner and grower to deal with whom they please, free of intimidation, threats and coercion").

ference and coercion applied to these associations.[11] Some Senators interpreted this bill as confirming the right of producers not to join a cooperative if they so chose. Senator Lausche, co-sponsor of the bill, explained that the decision whether to belong to an association "is completely up to [producers], being permitted either to join or not to join." May 1967 Hearings at 13. Senator Williams testified in support of the principles of the bill, and stated that the "freedom of choice of any farmer *to join or not to join* an organization of his choice *is a basic American right*, and it must be protected." May 1967 Hearings at 10 (emphasis added). Senator Jordan similarly stated:

> I think the law intends that [the producer] can bargain collectively in cooperatives or in associations, and he should not be intimidated in his right to belong, but he should not be made to join unless he wants to join. *He ought to be able to sell anywhere he wants to sell.* May 1967 Hearings at 170 (emphasis added).[12]

But substantial doubt was expressed whether the bill would accomplish the desired goal of ensuring that a producer would be free to decide not to join an association. As the National Canners Association testified:

> The definition of "handler" may well include—and probably does include—a bargaining association. We understand that is the intent. On the other hand, if the Senator will address himself to the prohibitions,

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[11] S. 109, 90th Cong., 1st Sess. § 3(a), Hearings on S. 109 Before the Subcomm. of the Senate Comm. on Agriculture and Forestry, 90th Cong., 1st Sess. 1-3 (1967) ("May 1967 Hearings").

[12] Supporters of the bill similarly stressed that "[c]ooperative bargaining associations are voluntary organizations. The closed shop and union shop concepts available to organized labor are not being sought by farmers." May 1967 Hearings at 32 (testimony of California Canning Peach Association); *see also* May 1967 Hearings at 26 (testimony of American Farm Bureau Federation).

> it is clear that *the provisions are all in terms of protecting the right of the producer to join an association and protecting the association itself. There is nothing in this bill which speaks about the right of a producer not to join an association.* May 1967 Hearings at 82 (emphasis added).

Many other organizations also urged that the bill be amended to protect explicitly the right of a producer not to join an association and instead to bargain individually for the sale of his products.[13]

These admonitions were heeded by the Senate. In the bill passed by the Senate and sent to the House of Representatives for consideration, the prohibitions established in Section 4 were amended to proscribe conduct that interfered with "any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers . . . ." [14] As the Senate Report on the bill succinctly stated:

> This bill is designed to protect the agricultural producer's right to decide, free from improper pressures, whether or not he wishes to belong to a marketing or bargaining association . . . . *The objective of the bill is to protect the producer in the exercise of a free choice.* (emphasis added).

S. Rep. No. 474, 90th Cong., 1st Sess. 1, 5 (1967) ("Senate Report"), *reprinted in* 1968 U.S. Code Cong. & Adm. News 1867, 1871.

When S. 109 was the subject of committee hearings in the House of Representatives, the bill was uniformly

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[13] *See, e.g.*, May 1967 Hearings at 94 and 198. One organization proposed an amendment to section 4 that would prohibit a producer "in the exercise of his right to join or not to join an association of producers." *Id.* at 147.

[14] S. 109, 90th Cong., 1st Sess. § 4(a); Hearings on S. 109 Before the House Comm. on Agriculture, 90th Cong., 1st Sess. 2-3 (1967) ("Sept. 1967 Hearings").

viewed as protecting a producer's right not to join an association and instead to bargain individually for the sale of his product. Congressman Langen explained in supporting the bill:

> [The bill] is designed to protect the agricultural producer's right to decide, free from improper pressures, whether or not he wishes to belong to a marketing and bargaining association. Sept. 1967 Hearings at 85.

Many of the organizations that had opposed the earlier versions of the bill now supported its adoption. The National Livestock Feeders Association, which had urged that a producer's right not to join an association be recognized, testified:

> We have contended that it was just as important to provide for protection of individual producers in exercising their individual rights to not join, or not to belong, or associate with a given organization, or for not following the dictates and demands of said group or association . . . . This objection has been honored in the new language . . . in Section 4 . . . . Sept. 1967 Hearings at 181.[15]

The House Committee favorably reported H.R. 13541, which mirrored (with non-germane differences) S. 109 as passed by the Senate. 114 Cong. Rec. 7463 (1968). The House Committee rejected an amendment that would have removed associations from the groups subject to the prohibition against interference with producers' right to choose whether to join an association. H.R. Rep. 824, 90th Cong., 1st Sess. 4-5 (1967).

In the House floor debates the bill's protection of a producer's right not to join an association was univer-

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[15] Other organizations also withdrew their previous opposition to the bill as a result of the Senate amendments. *See* Sept. 1967 Hearings at 91-92 (Chamber of Commerce), at 153-54 (National Broiler Council), and at 136-37 (National Canners Association).

sally recognized. Congressman Poage, Chairman of the House Agriculture Committee, agreed that the bill will protect the right of a producer to say to an association "I do not want to join your association and you cannot force me into it." 114 Cong. Rec. 7450 (1968). Other Congressmen stressed that under the bill, the decision whether to join an association "belongs to the farmer," [16] that the Senate "has spelled out the right of farmers to join or not to join these associations," [17] and that the bill protected the voluntary right of processors to join together in associations.[18] As S. 109 was enacted into law it prohibited conduct that interferes with "any producer in the exercise of his right to join and belong to or refrain from joining or belonging to an association of producers . . ." 7 U.S.C. § 2303(a).

Against this legislative backdrop, the Michigan Supreme Court's holding that the Michigan Act does not conflict with the Federal Act cannot be supported. The state court held that the Federal Act "does not afford an absolute right to a producer to deal directly with a handler." 332 N.W.2d at 139. But the legislative history is replete with statements like that found in the Senate Report, which affirm that the "objective of the bill" was to provide the producer a "free choice" not to join a marketing and bargaining association, and that joining such an association would be strictly "voluntary." [19] The Federal Act protects the right of a producer "to sell anywhere he wants to sell." May 1967 Hearings at 170

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[16] 114 Cong. Rec. 7464 (statement of Rep. Sisk).

[17] 114 Cong. Rec. 7466 (statement of Rep. Latta).

[18] 114 Cong. Rec. 7459 (statement of Rep. Scherle); 114 Cong. Rec. 7457 (statement of Rep. Goodling).

[19] Senate Report at 1, 5; *see also Garrison* v. *Dairymen, Inc.*, No. 80-1080-3, slip op. (D.S.C. July 28, 1980) ("[the] primary objective [of the Federal Act] is to protect a producer's freedom to choose between joining and not joining a cooperative").

(statement of Senator Jordan). The legislative history makes clear that the Federal Act does afford a producer the right to deal directly with a handler rather than through an association. That right is extinguished by the Michigan Act, which allows a group of producers to form an accredited association and control all terms of sale for nonmembers. Because the Michigan Act thus conflicts with the purposes and objectives of the Federal Act, the Michigan Act is preempted.

B. Compliance With Both Acts Is Impossible Because the Federal Act Prohibits Coercion of Producers by an Association And the Michigan Act Requires That Nonmember Producers Sell Only at Prices and Other Terms Negotiated Between an Accredited Association and Handlers.

The Michigan court rejected the argument that the coercion of nonmember producers embodied in the Michigan Act is in direct conflict with the federal prohibition against coercion of producers by associations and other handlers. 332 N.W.2d at 139. The court reasoned that although the Federal Act makes it unlawful for a handler to coerce a producer, "it does not forbid a *state* from requiring exclusive representation of individual producers where a producer majority sees fit," and "[e]ven if [the Michigan Act] were read to require a producer to *join* an association, the coercion would be the product of state action not handler action." [20]

The Michigan court cited no authority for the state action doctrine it relied upon to avoid finding a direct conflict between the Michigan and Federal Acts, but if that theory has any validity whatever it must derive from the body of law that has developed in the Supreme Court's

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[20] 332 N.W.2d at 139 & n.13 (emphasis in original). The court failed to note that under the Federal Act the term "handler" includes associations of producers. 7 U.S.C. § 2302(a)(3), (c) and (d).

application of the state action doctrine as announced in *Parker* v. *Brown*, 317 U.S. 341 (1943). In that case the Court held that even though a program established by the California Agricultural Prorate Act "would violate the Sherman Act if it were organized and made effective solely by . . . private persons," the California law was not preempted by the Sherman Act because the latter is "a prohibition of individual and not state action." 317 U.S. at 350-52. The holding was based upon the fact that "it is the state . . . which adopts the program and which enforces it with penal sanctions," and the "state itself exercises the legislative authority in making the regulation and in prescribing the conditions of its applications." 317 U.S. at 352. The Court made clear, however, that a state cannot "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351.

The state action doctrine announced in *Parker* v. *Brown* and considered in a number of subsequent cases has involved the question of whether a state law is in direct conflict with and thus preempted by the Sherman Act or other federal antitrust laws.[21] The Michigan court's reliance upon the doctrine in a preemption case involving a federal law other than an antitrust law may indeed be unusual, but the basis for and analysis of the doctrine in *Parker* v. *Brown* and its progeny would appear to be squarely on point for determining whether the Michigan Agricultural Marketing and Bargaining Act directly conflicts with the Federal Agricultural Fair Practices Act.[22] In both cases the central inquiry is whether the state law and regulations directly mandate an activity which is prohibited by a federal law, or whether the state law pur-

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[21] *See* Shenefield, *The Parker* v. *Brown State Action Doctrine and the New Federalism of Antitrust*, 51 Antitrust L. J. 337 (1982).

[22] The "standards of fair practice" established by the Federal Act (7 U.S.C. §§ 2301, 2303) proscribe some activities that would probably also constitute violations of the federal antitrust laws.

ports to authorize private persons to engage in conduct which violates the federal law.[23] In *Parker* v. *Brown* the state promulgated the regulations and prescribed the conditions of their application to producers. 317 U.S. at 346-48, 352. In contrast, the Michigan law puts in the hands of associations the authority to negotiate on behalf of nonmember producers and through such negotiations to prescribe the price, quality and quantity of the commodity to be sold by all producers to each handler. Mich. Comp. Laws § 290.713(1).

The distinction between "state action" and private action authorized by the state has been elaborated by this Court in a number of cases since *Parker* v. *Brown*. In *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), for example, the Supreme Court invalidated on grounds of federal supremacy a state law establishing a wine resale price maintenance plan. Addressing the question of whether the plan met the state action exemption of *Parker* v. *Brown*, the Court found:

> The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. 445 U.S. at 105-06.

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[23] The state action issue is controlling in determining whether the Michigan Act mandates activity which is squarely prohibited by the Federal Act. As the argument in the text will set forth, the state action doctrine is not applicable in this case. But even if the Michigan court were correct in holding that the coercion prescribed in the Michigan Act is state action, the question would remain whether the state act stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Federal Act. That argument is addressed in part I.A of this brief. In *Parker* v. *Brown* the Court held that the California law involved state action. It nevertheless went on to consider whether the California law was otherwise preempted by federal agricultural laws. 317 U.S. at 352-59.

The Court thus held that although the state program had been clearly articulated and firmly expressed by the state, it was not so actively supervised by the state itself as to qualify as state action and thus to avoid preemption by the Sherman Act.[24]

The Michigan court's characterization of association coercion of producers under the Michigan Act as "state action" thus finds no support in the cases in which the state action doctrine has been applied or rejected by this Court. Whereas in *Midcal* the key factor was the establishment of prices by private parties without review by the state (445 U.S. at 105), under the Michigan Act the association establishes through negotiations with handlers the price, quantity and quality of the commodity to be sold by member and nonmember producers to each handler, without review or approval by the state.[25] Acting under the authority granted by the state, an association is thus empowered to coerce unwilling producers to enter into marketing contracts with the association and to enter into specific contracts with handlers, at terms negotiated by the association. That coercion by associations is precisely what is prohibited under section 4 of the Fed-

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[24] At 445 U.S. 105 n.8, the Court cited Note, *Parker* v. *Brown Revisited: The State Action Doctrine After Goldfarb, Cantor and Bates*, 77 Colum. L. Rev. 898, 916 (1977). On the page cited by the Court the author distinguished between "state action" mandating the precise anticompetitive conduct under attack, and a law which required specific persons to adhere to prices "determined by the private parties." This latter clause of course describes the type of statutory scheme found in the Michigan Act.

[25] The state may become involved in prices and other terms of sale only if an association and a handler cannot reach agreement in their negotiations, and then only through compulsory arbitration before a three-person committee. Mich. Comp. Laws §§ 290.716-290.725. In any event, a nonmember producer is powerless to demand arbitration if he does not like the price and other terms negotiated and dictated by the association.

eral Act.[26] The conflict is direct and unavoidable, and compliance with both federal and state statutes is a physical impossibility. The Supremacy Clause requires that the Michigan Act be invalidated.

II. THE MICHIGAN ACT IS PREEMPTED BECAUSE IT REQUIRES A HANDLER TO DEAL WITH ASSOCIATIONS, AND THE FEDERAL ACT PROVIDES THAT A HANDLER CANNOT BE REQUIRED TO DO SO.

The Federal and Michigan Acts adopt completely divergent approaches to the question whether a handler can be required to deal with an association of producers. This conflict provides an independent basis for the preemption of the Michigan Act.

The Michigan Act requires a handler to deal with an accredited association of producers. It provides that an accredited association is the exclusive bargaining agent for all producers in the bargaining unit. Mich. Comp. Laws §§ 290.710(1), 290.713(1). A handler is required to bargain with an accredited association if the handler had substantial past dealings with the producers in the bargaining unit. *Id.* § 290.704(1)(g). A handler is forbidden from negotiating with an individual producer in the bargaining unit. *Id.* § 290.704(1)(h).

The Federal Act adopts the diametrically opposite approach. While the Michigan Act requires a handler to deal with an accredited association, the Federal Act expressly provides that it does *not* "require a handler to deal with an association of producers." 7 U.S.C. § 2304. The two laws are thus, on their face, wholly inconsistent.

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[26] Section 4(c) makes it unlawful for a handler (including an association) "[*t*]*o coerce . . . any producer to enter into . . . a . . .* marketing contract with an association of producers or *a contract with a handler.*" 7 U.S.C. § 2303(c) (emphasis added).

The legislative history of the Federal Act also makes clear that one of Congress' central purposes was to protect the right of a handler to deal and bargain individually with producers rather than through a bargaining association of producers. Because the Michigan Act eliminates that right, it stands as an obstacle to the accomplishment of the Federal Act's purposes, and is accordingly preempted.

A. The Legislative History of the Federal Act Shows That Congress Intended To Protect the Right of a Handler To Bargain With Individual Producers and Not Associations.

The first Senate hearings on S. 109 were devoted in substantial part to the question whether the proposed legislation would preserve the pre-existing right of handlers to choose to deal directly with producers rather than with an association of producers. Some proponents of the legislation insisted that S. 109 left unfettered a handler's right not to deal with a bargaining association; the American Farm Bureau Federation testified that it "does not seek, and will not support, legislation to force processors to negotiate with marketing associations. We seek only legislation which sets forth rules of fairplay . . ." June 1966 Hearings at 15.[27]

In spite of these unambiguous statements of intent by proponents, the absence of specific protection for a handler's right to choose his suppliers engendered vigorous opposition to S. 109. Witnesses contended that the bill was wholly inconsistent with the *Colgate* doctrine,[28] which recognized a purchaser's unilateral right under the anti-

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[27] *See also* June 1966 Hearings at 108 (testimony of National Milk Producers Federation) ("[t]he purpose of S. 109 is not to require any processor to purchase products from organized producers . . .").

[28] *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919).

trust laws to choose his suppliers.[29] The proposed legislation was viewed as restraining a handler's right to choose "to purchase raw products from growers with whom he could negotiate on an individual basis. . . ." [30]

The bill was opposed by the Department of Justice for this very reason. In responding to the chairman of the House Judiciary Committee's request for the Department's views on the legislation, the Department warned that the bill "might be interpreted as having the effect of forcing purchasers to buy from cooperatives and their members," and opposed the section of the bill containing these possible prohibitions.[31]

When S. 109 was re-introduced in 1967 (not having been reported out of committee in the previous Congress), it provided that associations of producers would themselves be subject to the bill's prohibitions. (*See* pp. 8-9, *supra*). Some took this to mean that a handler's right to decide whether to deal with an association was now protected; Senator Lausche, co-sponsor of the bill, observed that:

> The bill does not force purchasers of farm products to deal with bargaining associations. *That decision is the decision of the purchasers, to decide for themselves whether they will deal with the individual farmer or deal with the marketing association.* May 1967 Hearings at 13-14 (emphasis added).[32]

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[29] June 1966 Hearings at 49 (testimony of National Tax Equality Association).

[30] June 1966 Hearings at 124 (testimony of National Canners Association).

[31] Letter from Ramsey Clark, Deputy Attorney General, to the Honorable Emanuel Cellar (July 25, 1966), *reprinted in* May 1967 Hearings at 107-08.

[32] *See also, e.g.*, May 1967 Hearings at 25 (testimony of American Farm Bureau Federation, the principal proponent of the legislation) ("[t]he legislation does not . . . [f]orce purchasers of agricultural products to deal with a marketing association of producers").

Nevertheless, various witnesses found the bill unclear on the issue, and argued that—

> The handler's rights to refuse to deal with a bargaining association and to select the producers from whom he will purchase should be made explicit by means of provisos in the act guaranteeing these rights.[33]

These concerns were addressed in S. 109 as passed by the Senate and sent to the House of Representatives for consideration. The Senate added a new section 5 to the bill, which provided:

> *Nothing in this Act shall* prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in an association of producers, nor prevent handlers and producers from dealing with one another individually on a direct basis, nor *require a handler to deal with an association of producers.* S. 109 § 5; Sept. 1967 Hearings at 3 (emphasis added).

The Senate Report on S. 109 made clear that Section 5 was intended as a "[d]isclaimer of any intent to prohibit proper dealings between producers and handlers or to compel dealings between handlers and associations." Senate Report, at 1. The Senate Report affirmed that while the bill would prohibit handler interference with producers' efforts to form associations, and would prevent handlers from refusing to deal *with a producer* merely because the producer belonged to an association, the bill would protect a handler's right to insist upon direct dealing with an individual producer rather than dealing with an association as bargaining agent of the producer:

> *Section 5 disclaims any intent* to prevent handlers and producers from selecting their customers and

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[33] May 1967 Hearings at 86 (testimony of National Canners Association); *see also, e.g.*, May 1967 Hearings at 210 (testimony of American Corn Millers Federation).

> suppliers for any reason other than a producer's membership in an association of producers, or to prevent handlers and producers from dealing with one another individually on a direct basis, or *to require a handler to deal with an association of producers. The bill does not prevent or require these actions and is not intended to do so.* While the proponents of the bill stated in their testimony that this was not the purpose, there was some concern, especially on the part of processors and other purchasers of agricultural products, that the bill in fact went further than intended . . . .
>
> While the bill does not prevent handlers and producers from dealing with one another individually on a direct basis, it does prevent handlers from exerting any improper pressure in an effort to weaken associations or discourage membership. *While the bill does not require a handler to deal with an association of producers, it certainly makes clear that farmers have a right to form such associations and should be protected in the exercise of this right.* The fact is clear that an association of producers which has obtained the voluntary membership of a large number of farmers deserves respect and recognition by the handler of agricultural products. Senate Report, at 7 (emphasis added).

The distinction between forbidding a handler from coercing a producer not to join (or to quit) an association, while preserving a handler's right to refuse to deal and bargain with the association itself, was recognized by the House of Representatives. As Congressman Schwengel explained:

> The Act . . . would not force purchasers to deal with marketing associations of producers nor would it prevent a purchaser from choosing the producers with whom he deals. Sept. 1967 Hearings at 36.

Other House members made the same observation. Representative Matsunaga stated that "[t]his legislation does

not purport to give farmers bargaining power per se . . . . It would preserve the long recognized right of a businessman in America to deal with whom he chooses, stipulating only that he does not use an individual's membership in a producers' organization as a basis for refusing to deal with him." Sept. 1967 Hearings at 124. Representative Steiger pointed out that "[t]he legislation does not force any processor to negotiate with any agricultural marketing organization or state which growers a processor must deal with." Sept. 1967 Hearings at 152.

As a result of the addition of the explicit protection of a handler's right not to deal with a bargaining association, groups that had previously opposed the legislation withdrew their opposition.[34] The House Committee reported H.R. 13541, which contained a Section 5 substantially the same as that in S. 109 as passed by the Senate. The Committee Report accompanying H.R. 13541 stated that nothing in the House modification of Section 5—

> is intended to impair the right of handlers and producers to deal with one another on an individual basis, which is preserved by section 5. Accordingly, *nothing in the bill prevents a handler from refusing to deal with a bargaining association notwithstanding its designation by a producer in a contract as his exclusive bargaining agent.* H.R. Rep. 824, 90th Cong., 1st Sess. 4 (1967) (emphasis added).

The full House of Representatives likewise recognized that the bill was designed to preserve the right of a handler not to deal with associations. Representative Steiger explained on the floor that "[t]he legislation does not force any processor to negotiate with any agricultural marketing organization . . . ." 114 Cong. Rec. 7460

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[34] Sept. 1967 Hearings at 138 (testimony of National Canners Association) ("the bill would not force handlers to deal with bargaining associations"); Sept. 1967 Hearings at 147-48 (testimony of National Association of Frozen Food Packers); Sept. 1967 Hearings at 154-55 (testimony of National Broiler Council).

(1968). Representative Montgomery, co-sponsor of the legislation, likewise observed that the act would not "require a handler to deal with an association of producers." 114 Cong. Rec. 7461 (1968). *See also* 114 Cong. Rec. 7465 (statement of Rep. Sisk). After amending Section 5 in a non-substantive manner,[35], the House adopted H.R. 13541, and bill was enacted into law in its present form.

This legislative history makes clear that a key purpose of the Federal Act is to preserve a handler's right to deal directly with individual producers, rather than with an association of producers. Yet the Michigan Act expressly makes it unlawful for a handler "[t]o negotiate with a producer included in the bargaining unit after an association is accredited" (Mich. Comp. Laws § 290.704 (1)(h)), and affirmatively requires a handler to bargain with an accredited association if the handler has had substantial past dealings with the producers in the bargaining unit prior to accreditation. *Id.* § 290.704(1)(g). The Federal Act and the Michigan Act could not be more inconsistent.

* * * *

Despite the Federal and Michigan Acts' facial inconsistency, two theories have been propounded why the acts are not in conflict. First, the Solicitor General suggests that the Federal Act does not protect the right of a producer to deal with individual handlers rather than associations. Second, the Michigan Supreme Court held that the manner in which the Federal Act addresses handler

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[35] Section 5 of H.R. 13541 as reported by the House Agriculture Committee had provided that the Act did not "prevent handlers and producers from dealing with one another individually on a direct basis, nor require a handler to deal with an association of producers." Because these two clauses were viewed as "saying basically the same thing," the first clause was deleted. 114 Cong. Rec. 7464 (statement of Rep. Sisk, sponsor of the amendment); *see also* 114 Cong. Rec. 7465 (statement of Rep. Sisk) (the amendment to Section 5 "does not in any sense change the intent or the meaning of the disclaimer section").

rights leaves the states free to prohibit handlers from dealing directly with individual producers. Neither theory is valid.

B. Section 5 of the Federal Act Makes Clear that a Handler May Refuse To Deal With an Association.

The Solicitor General in his amicus brief supporting probable jurisdiction expresses "doubt" whether the Federal Act was intended "to create or protect a [handler's] right to deal with the individual farmer of his choice" rather than with an association.[36] The Solicitor General states that an obligation to deal with an association arises by a producer's appointment of an association as his agent, coupled with the Federal Act's prohibition of discrimination against a producer because of his membership in or contract with an association. Solicitor General Br. 12 n.5. But the result of this analysis would be that a handler could be forced to deal with an association of producers by the terms of the Federal Act, notwithstanding the fact that Section 5 of the Federal Act unambiguously provides that a handler is *not* required to do so.

The Solicitor General was apparently driven to this tenuous statutory construction by his belief that "[i]f handlers can insist on dealing directly even with producers who have voluntarily appointed an association as their designated agent, the protections of the [Federal Act] would not be meaningful." Solicitor General Br. 12. That fear is unfounded. The Solicitor General himself described the "principal thrust" of the Federal Act to be the prevention of handler interference "with the *formation* of cooperative associations by exerting pressure on individual farmers." *Id.* at 6 (emphasis added).[37]

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[36] Brief for the United States as Amicus Curiae Supporting Appellants ("Solicitor General Br."), at 12.

[37] That characterization is supported by the testimony at the Senate and House hearings relating to alleged handler misconduct, the bulk of which concerned threats or refusals to deal or contract

Section 4 prevents any such interference: so long as an association is in an organizational stage, or has not yet sought to be designated as exclusive bargaining agent of its producer members, handlers are strictly forbidden from interfering with the association or refusing to deal *with producers* because of their membership in the association. An association can thus be formed without fear that the very act of its creation can lead handlers to refuse to deal with its members. The association is thus able to attract members and attain a competitive bargaining position free from coercion or interference with members or prospective members.

But once the association has been designated by its members as their exclusive bargaining agent, the members have precluded themselves from dealing directly with handlers. The handlers are left with the choice of purchasing the members' products by bargaining with the association, or of refusing to deal with the association and looking elsewhere for raw products.[38] The protected status of the association and its members afforded by the Federal Act before the association is designated as bargaining agent may well have permitted the association to attract enough voluntary members that a handler will

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with a producer merely because he had joined or attempted to form an association. *See* June 1966 Hearings at 64 (testimony of National Farmers Union); May 1967 Hearings at 25 (testimony of American Farm Bureau Federation); June 1966 Hearings at 19 (testimony of F. Kirby); June 1966 Hearings at 25 (testimony of A. Snapp). Any such handler conduct is clearly prohibited by Section 4 of the Federal Act.

[38] If the handler makes a business decision not to deal with an association, he may not attempt to deal directly with a producer who has contractually appointed an association as his exclusive agent. The Federal Act does not alter the prohibitions in "existing State law" against tortious interference with contractual arrangements such as those that may be entered into between producers and associations. 7 U.S.C. § 2305(d).

have no choice but to make the business decision to deal with the association. But the Federal Act does not itself require him to do so; Section 5 expressly provides that a handler cannot be required "to deal with an association of producers."

The court in *Butz* v. *Lawson Milk Co.*, 386 F. Supp. 227 (N.D. Ohio 1974), agreed that while the Federal Act forbids interference with a producer's right to join or form an association, the Act also preserves a handler's right to decide not to deal with an association. The court held that the defendant handler had violated the Federal Act because it had terminated its contract with a producer simply because the producer had joined an association, without first determining whether the producer's membership in the association would require the handler to deal with the association. 386 F. Supp. at 238-39.[39] Had the association attempted to require the handler to deal with it, the court recognized that the handler "could then have lawfully refused to deal with [the association] and [the producer]." *Id.* at 239.

The Solicitor General attempts to distinguish *Butz* v. *Lawson Milk Co.* as presenting a "different question" because it involved a preexisting contract contemplating direct dealing between a handler and producer. Solicitor General Br. 13 n.6. But there is nothing in the Court's opinion, or in the language or legislative history of the Federal Act, that even arguably limits the disclaimer in Section 5 to those few situations in which a handler and a producer have a preexisting contract. Section 5 contains no such limitation, eliminating without qualification

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[39] The court found that the defendant handler had also violated the Federal Act when it inserted clauses in its contracts with producers that terminated the contract if the producer "entered into an agreement with any . . . association" regardless of the nature of that agreement. 386 F. Supp. at 240.

any requirement that a handler deal with an association of producers.[40]

C. The Michigan Act Is Inconsistent Wtih Congress' Intention To Protect Handler Rights.

The Michigan Supreme Court concluded that because the right of handlers not to deal with associations is expressed in Section 5 of the Federal Act in terms of what the Act does not do,[41] the Federal Act cannot be seen as creating or protecting any handler rights. 332 N.W.2d at 138. The state court concluded that the Michigan Act's requirement that handlers deal with accredited associations did not conflict with the Federal Act.

That analysis cannot be reconciled with the House Report's explicit statement that Section 5 was intended to protect a handler's right to deal with individual producers:

> [The Federal Act is] not intended to impair the right of handlers and producers to deal with one another on an individual basis, *which is preserved by section 5.*" H.R. Rep. 824, 90th Cong., 1st Sess. 4 (1967) (emphasis added).

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[40] Developments since enactment of the Federal Act confirm that the Act protects the right of handlers to decide not to deal with associations. In 1971 hearings were held on proposed legislation that would have required handlers to bargain with associations of producers. The sponsor of one of these proposed bills recognized that the Federal Act "did not impose the obligation to bargain [with associations] on commercial food processors or their representatives," and that "[a]s a result, the food handlers could refuse to bargain with a producer organization and buy directly from individual producers even though they were members of organizations set up to negotiate for them." Hearings on H.R. 348 *et al.* Before the Subcomm. on Domestic Marketing and Consumer Relations of the House Comm. on Agriculture, 92nd Cong., 1st Sess. 2 (1971) (statement of Rep. Sisk).

[41] Section 5 of the Federal Act provides that "[n]othing in this chapter shall . . . require a handler to deal with an association of producers."

The fact that Congress protected a handler's right not to deal with an association through a provision explaining what the Federal Act did *not* do merely reflects the difference between the handler rights protected by Section 5 of the Federal Act and the producer rights established by Section 4. The Federal Act is designed to protect producer rights by prohibiting handlers from interfering with producers engaged in various specific activities. Since adequate protection from such interference was not thought previously to have existed (at least with respect to some of these rights),[42] it was necessary for Congress to set forth affirmatively in Section 4 the producer conduct with which handlers may not interfere.

But the right of handlers to choose their suppliers was a pre-existing right that the Federal Act was designed to maintain, not establish.[43] Unlike the producer activities included in Section 4 that had allegedly been inhibited by handlers, the handler rights established in Section 5 had not been infringed by associations or others, or by any state law then existing. Accordingly, it was sufficient for Congress to provide, as it did in Section 5, that the Federal Act does not interfere with a handler's right not to deal with an association, rather than affirmatively to establish a handler's right to deal with individual producers.

The fact that Congress logically chose the Section 5 formulation for protecting handler rights thus does not bear on the question whether the Michigan Act is preempted by the Federal Act. As we have shown, the Congressional intent to protect a handler's right not to deal with an association is clear from the language and legislative history of the Federal Act, and it is the existence

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[42] *See* June 1966 Hearings at 4 (Statement of Senator Aiken); May 1967 Hearings at 19-21 (testimony of the Secretary of Agriculture); Senate Report, at 4-7.

[43] *See* pp. 18-19, *supra*.

of a conflict between Congressional intent and state law that determines whether the state law is preempted. Since the Federal Act confirms a handler's right not to deal with an association, while the Michigan Act destroys that right, the Michigan Act is invalid.

CONCLUSION

For the reasons set forth above, the decision of the Supreme Court of Michigan should be reversed.

Respectfully submitted,

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No. 82-1577

In the Supreme Court of the United States

OCTOBER TERM, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., ET AL., APPELLANTS

v.

AGRICULTURAL MARKETING AND BARGAINING BOARD, ET AL.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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QUESTION PRESENTED

Whether certain provisions of Michigan's Agricultural Marketing and Bargaining Act are preempted by the Federal Agricultural Fair Practices Act of 1967.

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ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

This brief is filed to elaborate upon the views of the United States submitted in response to the Court's invitation to the Solicitor General of March 16, 1983.

STATEMENT

This case is a challenge to certain provisions of Michigan's Agricultural Marketing and Bargaining Act, which are alleged to conflict with the federal Agricultural Fair Practices Act of 1967. The Michigan Supreme Court found that the state law was not preempted by the federal Act.

1. The federal Agricultural Fair Practices Act of 1967 (AFPA), 7 U.S.C. 2301 *et seq.*, guarantees farmers and other producers of agricultural commodities (producers)[1]

[1] 7 U.S.C. 2302(b) provides:

> The term "producer" means a person engaged in the production of agricultural products as a farmer, planter, rancher, dairyman, fruit, vegetable, or nut grower.

the freedom to join cooperative associations without fear of reprisal from those who acquire agricultural products (handlers).[2] 7 U.S.C. 2303 makes it unlawful for any handler to engage in practices that interfere with a producer's freedom to associate. Section 2303(a) prohibits any handler to "coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers * * *." Section 2303(b) forbids handlers to discriminate against producers concerning price, quantity, quality, or terms of purchase, because of membership in an association. Section 2303(c) forbids handlers to coerce producers into, or out of, a membership agreement or contract with an association. Section 2303(d) prohibits handlers to offer money or other inducements to keep producers from joining an association. Handlers are also forbidden to make false reports about the finances, management, or activities of associations (7 U.S.C. 2303(e)).

Although the Act forbids handlers to interfere with a producer's decision to join (or not to join) an association, it does not prevent handlers and producers from dealing or refusing to deal with one another for other reasons. 7 U.S.C. 2304 states that "[n]othing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association of producers." The Act does not attempt to occupy the entire field of regulation. Its provisions "shall not be construed to change or modify existing State law nor to deprive the proper State courts of jurisdiction" (7 U.S.C. 2305(d)).

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[2] 7 U.S.C. 2302(a) provides:

> The term "handler" means any person engaged in the business or practice of (1) acquiring agricultural products from producers or associations of producers for processing or sale; or (2) grading, packaging, handling, storing, or processing agricultural products received from producers or associations of producers; or (3) contracting or negotiating contracts or other arrangements, written or oral, with or on behalf of producers or associations of producers with respect to the production or marketing of any agricultural product; or (4) acting as an agent or broker for a handler in the performance of any function or act specified in clause (1), (2), or (3) of this paragraph.

2. The Michigan Agricultural Marketing and Bargaining Act, Mich. Comp. Laws § 290.701 *et seq.* (1979), enacted in 1972, makes illegal the same handler conduct forbidden by the AFPA. Mich. Comp. Laws § 290.704(1). But the Michigan Act goes beyond the federal Act by regulating producers as well as handlers. It creates an Agricultural Marketing and Bargaining Board, within the Michigan Department of Agriculture, that accredits producer associations and mediates disputes. Mich. Comp. Laws §§ 290.703, 290.707, 290.715. The Michigan Act forbids associations to discriminate against producers; to refuse to bargain with handlers with whom the association or its members have had substantial prior dealing; to coerce or intimidate handlers in certain respects; and to make unsubstantiated reports about the finances, management, or activities of other associations or handlers. Mich. Comp. Laws § 290.704(2).

To be accredited, an association must have marketing and bargaining contracts (for the relevant period) with more than 50% of the producers in the bargaining unit. These contracts must also include more than 50% of the commodity produced in the bargaining unit. Mich. Comp. Laws § 290.707(c). Once accredited, the association acts as the exclusive bargaining agent for all producers in the bargaining unit, and producers must pay a service fee to the association. A producer must pay the fee, and abide by the terms of the contracts negotiated with handlers, even if he chooses not to become a member of the association. Mich. Comp. Laws §§ 290.710(1), 290.713(1).

3. The Michigan Agricultural Cooperative Marketing Association, Inc. (MACMA) is an association accredited under the Michigan Act. It is the sole sales and bargaining representative for certain Michigan producers for asparagus. In 1974 MACMA negotiated contracts with handlers. Shortly thereafter appellants (representatives of handlers and producers) sued in the Ingham County Circuit Court for a declaration that the portions of the Michigan Act requiring service fees, and mandatory producer adherence to the association contracts, were preempted by the federal Act. The circuit court ruled that the case could be brought only in the Michigan Court of Appeals, and dismissed (J.S.

App. A33-A37). The Michigan Court of Appeals also dismissed for want of jurisdiction (*id.* at A38-A39), and an appeal was taken to the Michigan Supreme Court. The Michigan Supreme Court remanded the matter to the circuit court, which it found was empowered to hear the case (*id.* at A44-A59). After a non-jury trial the circuit court ruled that the state statute was not preempted (*id.* at A60-A76).

4. The Michigan Supreme Court affirmed (J.S. App. A1-A32). Appellants argued that the federal Act gave handlers a right to deal with producers of their choice, and producers a right to deal with handlers of their choice. They urged that the Michigan Act, by requiring all producers in a bargaining unit to pay a service fee and adhere to the terms of the contract negotiated by the association, violated these rights.

The Michigan Supreme Court rejected that claim. It found the federal Act limited to preventing certain kinds of *handler* misconduct. The court thus viewed Michigan's regulation of *producers* as a step into an area that the federal government had not attempted to regulate (J.S. App. A14):

> In our view, the provisions of AMABA affording exclusive representation to a producers' cooperative created by a majority of the producers of a particular commodity, and the requirement of service fees, was a step by the Michigan Legislature into a previously unregulated area; a step which furthers both the goals of [the AFPA] and others not prevented by [the AFPA] by taking an active role in enhancing the bargaining position of producers, protecting not only individuals, but also their associations from internal and external pressures.

The court also rejected appellants' argument that compliance with the two statutes was physically impossible (J.S. A16-A17).

SUMMARY OF ARGUMENT

1. The Michigan Act, insofar as it requires all producers in an accredited bargaining unit to pay a service fee and adhere to the terms of the contract negotiated by the association, frustrates the purposes and objectives of the AFPA.

It is evident from the language of the federal Act that Congress explicitly forbade associations to coerce individual producers into joining an association, making or maintaining a marketing contract with an association, or terminating contractual relationships individually negotiated with handlers. 7 U.S.C. 2303(a) and (c) (prohibited practices); *id.* § 2302(a) and (d) (prohibited practices section applies to associations).

That conclusion emerges even more clearly from the legislative history of the AFPA. The version of the Act first introduced made no mention of a producer's right to remain independent from marketing and bargaining associations. That omission was the primary focus for criticism of the bill in the Senate hearings. Opponents of the bill gave a number of reasons for inclusion of such a right. In some cases handlers were in direct competition with cooperative associations that performed processing or marketing functions for their members. In such cases compulsory association membership would have the effect of driving competing handlers out of business. And even where the association acted only as a bargaining agent for producers, handlers felt that if membership were not voluntary they would lose both the price advantages and control over product quality that they enjoyed in direct dealing with independent producers. Similar fears were expressed by some producers, who felt that they could fare better (because of the quality of their products) by dealing independently than they could through an association. Still another concern frequently voiced was that compulsory association membership could result in producer monopolies, and thereby frustrate the policies of the antitrust laws. Finally, it was urged that a desirable competition among cooperative associations for members would be impeded if producer membership were not voluntary.

As a result of these concerns, the Senate amended the original bill to provide specifically that individual farmers should be "free to join together *or not to join together* in cooperative organizations" (113 Cong. Rec. 21410 (1967) (emphasis added)). The prohibited practices section of the Senate bill was also explicitly addressed to "any handler *or association of producers*" (*ibid.* (emphasis added)).

In the House hearings the Senate amendments were fully discussed, and the House Committee on Agriculture consciously decided to make no change in the prohibited practices section. The phrase "free to join together or not to join together" in the opening section of the bill was simply amended to read "free to join together voluntarily" (H.R. Rep. 824, 90th Cong., 1st Sess. 3 (1967)).

On the floor of the House the phrase "association of producers" was deleted from the prohibited practices section. It was stressed, however, that since associations were already included in the definition of "handler," the deletion worked no substantive change in the bill. 114 Cong. Rec. 7464 (1968) (remarks of Rep. Sisk). Among the reasons discussed for preserving the producer's right not to join an association was that "[t]he fees being charged by these associations are no small matter to the farmer." 114 Cong. Rec. 7450 (1968) (remarks of Rep. Latta).

2. The Michigan Supreme Court held that the AFPA, while it forbids associations to coerce individual producers into becoming members, does not apply to similar action by the states. Michigan's Act, however, does nothing more than empower associations that are sufficiently large to do what the AFPA forbids. It is essentially no different from the Louisiana "nonsigner" law that this Court held to be preempted by the Sherman Act in *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384 (1951). The analogy is particularly apt since one of the very reasons for requiring voluntary association membership in the AFPA was the concern that any other course would undermine the policies of the antitrust laws.

Nor is it significant that Michigan's Act does not require nonsigning producers to formally join an accredited association. In the first place, the AFPA forbids not only compulsory membership but also forcing any producer to "enter into * * * [a] marketing contract with an association" (7 U.S.C. 2303(c)). In any event, the distinction between formal membership and what the Michigan Act requires is insubstantial, since independent producers are required to pay dues to the association and are bound by the terms of its bargain with handlers.

3. Appellants also argue that Congress in the AFPA intended "to protect a processor's right to deal individually with farmers" (J.S. 18), and that the Michigan Act conflicts with that right. We doubt that that is so. The Senate report makes clear that Congress did not intend to "prevent or require" any particular form of dealing between processors, on the one hand, and producers or associations on the other. S. Rep. 474, 90th Cong., 1st Sess. 7 (1967). And the House report specifically states that "the scope of the bill embrace[s] only the prohibited acts in section 4" (H.R. Rep. 824, *supra*, at 5), which protects individual producers, not processors.

ARGUMENT

BY COMPELLING INDIVIDUAL PRODUCERS TO SUPPORT ACCREDITED ASSOCIATIONS AND ADHERE TO THE TERMS OF CONTRACTS NEGOTIATED BY SUCH ASSOCIATIONS, THE MICHIGAN ACT FRUSTRATES THE PURPOSES AND OBJECTIVES OF THE AGRICULTURAL FAIR PRACTICES ACT

This Court has held that federal regulation should not be deemed to preempt state regulatory power except for persuasive reasons. If there is no explicit preemptive language, the federal action must touch a field where federal regulation is dominant, or there must be an actual conflict with federal law. *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982). Here there is no explicit preemptive language. The federal Act states that it "shall not be construed to change or modify existing State law" (7 U.S.C. 2305(d)).[3] Nor, as appellants admit, is the

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[3] The intent of Section 2305(d), however, is somewhat more restricted than its language might suggest. It was not intended to give an imprimatur to all state laws regardless of how they might conflict with the AFPA. In fact, the version of that provision passed by the Senate provided simply that "[t]he foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction." 113 Cong. Rec. 21410 (1967). That was modified to its current form by the House Committee on Agriculture, which stated by way of explanation (H.R. Rep. 824, *supra*, at 4, 6:

> This amendment was adopted to clarify the committee's intent that no State law should be superseded or preempted by this leg-

federal interest so dominant that the field of regulation has been entirely occupied (J.S. 8). This Court has recognized that "the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 144 (1963).

The question, therefore, is whether the state and federal Acts are in conflict—that is, whether compliance with both is "a physical impossibility" (373 U.S. at 142-143), or whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. at 154-159. This in turn depends upon "Congress' intent in enacting the federal statute at issue." *Shaw* v. *Delta Air Lines, Inc.*, No. 81-1578 (June 24, 1983), slip op. 9.

1. We believe that insofar as the Michigan Act requires all producers in a bargaining unit to pay a service fee and adhere to the terms of the contract negotiated by the association, it frustrates the "purposes and objectives" of the AFPA. That conclusion is not compelled by the principal thrust of the federal Act, which in general is designed to prevent handlers from interfering with the formation of cooperative associations by exerting pressure on individual farmers. Nor does the federal Act attempt to address in a comprehensive way—as the Michigan Act does—the collective bargaining rights of producers and handlers. See 114 Cong. Rec. 7453-7454 (1968) (remarks of Rep. Poage);

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islation which is supplementary to and not in replacement of all other existing legal remedies.

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The last sentence of section 6 specifically retains all existing legal remedies available under State law.

Such remedies might include, for example, damages or an injunction for malicious interference with contractual relationships. See, *e.g.*, *Pure Milk Products Co-op.* v. *National Farmers Organization*, 332 F. Supp. 866, 868 (E.D. Wis. 1971).

id. at 7456 (remarks of Rep. May).[4] Nevertheless, both the explicit terms of the federal Act and its legislative history indicate that Congress intended to protect individual producers against any sort of compulsion to join (or be effectively controlled by) cooperative associations. The Michigan Act stands as an obstacle to that purpose.

a. The congressional findings and declaration of policy with which the AFPA begins state that (7 U.S.C. 2301 (emphasis added)):

> the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together *voluntarily* in cooperative organizations as authorized by law.

The succeeding sections of the Act make clear the significance of the word "voluntarily." It signifies freedom from pressure either by processors (to stay out of an association) or by associations (to join or contract with an association).[5]

7 U.S.C. 2303, the prohibited practices section, provides that (emphasis added):

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[4] Moreover, this Court has recognized that the states retain authority to regulate directly the marketing of agricultural products— including such matters as the price and quantity of commodities sold. *Parker* v. *Brown*, 317 U.S. 341 (1943). And it might be argued that direct state control of agricultural marketing interferes no less with the freedom of individual producers than the exercise of similar power by cooperative associations. But as this Court has noted in other contexts, there often are substantial differences between direct state control of prices, for example, and delegation of the same control to private parties. Compare *Parker* v. *Brown*, *supra*, with *Californic Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Cf. *Larkin* v. *Grendel's Den, Inc.*, No. 81-878 (Dec. 13, 1982), slip op. 6.

We note that within the State of Michigan, federal marketing orders under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*) are in effect only for cranberries and cherries. See 7 C.F.R. Pts. 929-930. Except for milk marketing orders, federal marketing orders generally do not establish a price for the regulated commodity but instead regulate the flow of commodities to market. See 7 U.S.C. 608c(6).

[5] In fact the word "voluntarily" was substituted by the House Committee on Agriculture for the phrase "free to join *or not to join* together," which appeared in the version of the bill passed by the Senate. H.R. Rep. 824, *supra*, at 3.

> It shall be unlawful for any handler knowingly to * * * engage in the following practices:
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> (a) *To coerce any producer in the exercise of his right* to join and belong to or *to refrain from joining or belonging to an association of producers;* or
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> * * * * *
>
> (c) *To coerce or intimidate any producer to enter into, maintain,* breach, cancel, or terminate *a membership agreement or marketing contract with an association of producers* or a contract with a handler * * *.

The term "handler" is defined in 7 U.S.C. 2302(a) (emphasis added):

> The term "handler" means *any person* engaged in the business or practice of * * * (3) *contracting or negotiating contracts or other arrangements* * * * *on behalf of producers* * * * with respect to the production or marketing of any agricultural product * * *.

And "[t]he term 'person' includes * * * associations." 7 U.S.C. 2302(d). In short, the federal Act forbids an association of producers (which negotiates marketing contracts and other arrangements on behalf of producers) to coerce individual producers into joining the association, staying in the association, or making or maintaining a marketing contract with the association. See *Butz* v. *Lawson Milk Co.*, 386 F. Supp. 227, 235 (N.D. Ohio 1974) (an association of producers is a "handler" within the meaning of the AFPA); *Marketing Assistance Plan, Inc.* v. *Associated Milk Producers, Inc.*, 338 F. Supp. 1019, 1024 (S.D. Tex. 1972) (same).

The disclaimer section of the Act also emphasizes that Congress envisioned a market in which individual producers would choose to remain apart from associations and negotiate their own terms with handlers. 7 U.S.C. 2304:

> Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association of producers.

b. The legislative history of the AFPA shows, even more plainly than the language of the Act itself, that Congress intended to shield producers from compulsory membership in an association. The bill originally introduced in the Senate, S. 109, 89th Cong., 1st Sess. (1965), made no reference to producers' rights to refrain from joining or dealing with associations. Those rights may have been presumed to exist, since S. 109 was first drafted as an amendment to the Capper-Volstead Act (7 U.S.C. 291-292),[6] and producers could not be compelled to join cooperatives authorized by that Act. See *Alexander* v. *National Farmers Organization*, 687 F.2d 1173, 1182 (8th Cir. 1982), cert. denied, No. 82-1586 (May 16, 1983); *Otto Milk Co.* v. *United Dairy Farmers Coop. Ass'n*, 388 F.2d 789 (3d Cir. 1967); *Gulf Coast Shrimpers & Oystermans Ass'n* v. *United States*, 236 F.2d 658, 665 (5th Cir.), cert. denied, 352 U.S. 927 (1956). Cf. *Maryland & Virginia Milk Producers Ass'n* v. *United States*, 362 U.S. 458, 467 (1960); *Columbia River Packers Ass'n* v. *Hinton*, 315 U.S. 143 (1942). The right to remain independent was not made explicit, however, and that aspect of the bill was the focal point for criticism in the Senate hearings.

Two major, and related, concerns were expressed by those testifying against the original version of S. 109. The first was that, because the bill did not recognize the right of producers to remain independent, farmers and ranchers could be forced to join marketing and bargaining associations. The second was that that fact (coupled with the kinds of practices prohibited by the bill) would make it impossible for handlers to deal individually with the producers of their choice.

A number of reasons underlay these concerns. One was that, in the case of some commodities, cooperative associations were actually in competition with handlers, and compulsory membership in an association would have the effect

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[6] S. 109 was later modified to "stand[] on its own base, rather than amend[] the Capper-Volstead Act." *Discrimination Against Members of Farmer Cooperatives: Hearings on S. 109 Before the Subcomm. of the Senate Comm. on Agriculture and Forestry*, 89th Cong., 2d Sess. 177 (1966) [hereinafter cited as *1966 Senate Hearings*].

of driving competing handlers out of business. This would be true, for example, where a cooperative provided facilities for ginning cotton for its members.[7] A related concern was that the emphasis on producer bargaining power and the possibility of compulsory membership were out of place where producers did not contract directly with handlers because there were open markets where their commodities could be sold.[8] A third reason for the concern about forced membership in an association was that handlers feared losing control over the quality of the product they purchased, not to mention whatever price advantages they enjoyed in dealing directly with independent producers.[9] Similar fears

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[7] See, *e.g.*, *1966 Senate Hearings* 135 (statement of A. Starke Taylor, Jr., Independent Cotton Industries Association), 138-140 (statement of Paul L. Courtney, National Association of Wholesalers), 206 (statement of Donald G. Smith, Texas Independent Ginners Association); *Agricultural Producers Marketing Act: Hearings on S. 109 Before the Subcomm. of the Senate Comm. on Agriculture and Forestry*, 90th Cong., 1st Sess. 122-123 (1967) [hereinafter cited as *1967 Senate Hearings*] (statement of Herman Eubank, Texas Independent Ginners Association). In the version of the AFPA ultimately enacted, cotton was exempted from the definition of "agricultural products." 7 U.S.C. 2302(e).

The Michigan Agricultural Marketing and Bargaining Act provides that to be accredited, an association must have contracts covering more than 50% of the quantity of a commodity produced in the bargaining unit. In computing that quantity, there is excluded "any quantity * * * contracted by producers with producer owned and controlled processing cooperatives * * *." Mich. Comp. Laws § 290.707(c).

[8] Compare *1966 Senate Hearings* 82 (statement of Dal Ferry, United States Poultry & Egg Producers Association) with *id.* at 41 (statement of Don F. Magdanz, National Livestock Feeders Association), 101-102 (statement of Charles E. Connor, Independent Livestock Marketing Association), and *1967 Senate Hearings* 198 (statement of Don F. Magdanz).

[9] See, *e.g.*, *1966 Senate Hearings* 124 (statement of Edward Dunkelberger, National Canners Association), 195-196 (statement of Edward Dunkelberger); *1967 Senate Hearings* 21 (statement of Orville L. Freeman, Secretary of Agriculture), 24 (statement of Charles B. Shuman, American Farm Bureau Federation), 69 (statement of Edward Brown Williams, National Association of Frozen Food Packers), 84-86 (statement of Edward Dunkelberger), 91-92, 94 (statement of G. Ted Cameron, National Broiler Council), 207-208 (statement of John D. Snow, Potato Processors of Idaho Association), 210 (statement

were expressed by at least some producers, who felt that the quality of their products would bring a better return if they were able to remain independent.[10] A fourth reason, frequently voiced, was that the policies of the federal antitrust laws—already modified by allowing producers to combine for purposes of marketing and bargaining, see 7 U.S.C. 291-292, 15 U.S.C. 17—would be undermined altogether if membership in cooperative associations were not voluntary.[11] Such a result would, of course, work to the detriment of consumers as well as handlers. Still a fifth reason, expressed among others by the Department of Agriculture, was that any suggestion that producers could be compelled to join cooperative associations could frustrate a desirable competition among cooperatives.[12] Finally, a number of witnesses simply indicated a feeling that the freedom to remain independent of an association was "a basic American right" that should not be restricted in the otherwise desirable effort to promote producer bargaining power.[13]

The solution to the concerns about compulsory association membership and prevention of direct dealing between handlers and producers took two forms in the bill passed by

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of Bert Tollefson, Jr., American Corn Millers Federation), 211 (statement of Don. M. Turnbull, American Poultry and Hatchery Federation).

[10] See, *e.g.*, *1967 Senate Hearings* 32 (statement of Ralph B. Bunje, California Canning Peach Association), 173-183 (statement of Paul L. Phillips).

[11] See, *e.g.*, *1966 Senate Hearings* 135-136 (statement of A. Starke Taylor, Jr., Independent Cotton Industries Association); *1967 Senate Hearings* 70 (statement of Edward Brown Williams, National Association of Frozen Food Packers), 104-105, 110, 112-114 (statement of W.W. Holding III, American Cotton Shippers Association), 144 & n.2, 151 (statement of Earl W. Kintner, National Tax Equality Association), 196 (statement of Irving Isaacson, Maine Poultry Associates).

[12] See, *e.g.*, *1966 Senate Hearings* 181 (statement of David W. Angevine, USDA Farmer Cooperative Service), 187 (statement of Sen. Aiken), 189-190 (statement of Harry L. Graham, National Grange).

[13] See, *e.g.*, *1967 Senate Hearings* 10-11 (statement of Sen. Williams); *1966 Senate Hearings* 146 (statement of Donald G. Smith, Texas Independent Ginners Association). Cf. *1967 Senate Hearings* 13-14 (statement of Sen. Lausche).

the Senate. The first was the creation of a statutory right for producers to refrain from joining or contracting with an association. The second was a disclaimer of intent to prevent individual dealing between handlers and producers.

The final Senate bill opened with a legislative finding and declaration of policy that (113 Cong. Rec. 21410 (1967)):

> SEC. 2 * * * [T]he marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together or not to join together in cooperative organizations as authorized by law.

It then went on to state, in the prohibited practices section (*ibid.* (emphasis added)):

> SEC. 4 *It shall be unlawful for any* handler or *association of producers* knowingly to engage * * * in the following practices:
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> (a) To coerce any producer in the exercise of his right to join and belong to or *to refrain from joining or belonging to an association of producers*[;]
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> * * * * *
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> (c) *To coerce or intimidate any producer* or other person *to enter into* [*or*] *maintain* * * * *a membership agreement or marketing contract with an association* of producers * * *.

The Senate report concerning that section stated:

> The objective of the bill is to protect the producer in the exercise of a free choice. Many witnesses suggested that the bill did not fully accomplish this purpose, because it protected the producer only from improper pressure not to join an association. To protect his free choice he should also be protected from improper pressure in the other direction, that is, improper pressure to join an association. The committee * * * was convinced by the logic of the situation that if the objective is to protect the producer and afford him a free choice, the bill should protect him from pressure in either direction.
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> * * * * *
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> Many witnesses, including individual producers, testified that as well as being free from interference in electing to join or not join an association, the producer should be free from improper pressure to interfere

with his arrangements and dealings with handlers; and the committee substitute would provide him with this protection.

S. Rep. 474, *supra*, at 5-6.

The report went on to note (*id.* at 6) that although "section 4(a) prohibits coercion on the part of both the handler and the association of producers," Section 4(d), which dealt with inducements or rewards (cf. 7 U.S.C. 2303(d)), should only apply to the former. "[T]he association of producers should not be prohibited from offering inducements to producers to belong to an association, since it is quite proper for the association to pursue vigorously the *voluntary* organization of farmers in its attempt to secure a better bargaining position for farmers." S. Rep. 474, *supra*, at 6 (emphasis added).[14]

The explanation of the disclaimer section (113 Cong. Rec. 21410 (1967)) emphasizes that, rather than creating rights not mentioned elsewhere, that section was intended to reemphasize two points implicit in the bill. The first was that where both producer and handler are willing, they may deal individually rather than through an association. The second was that where a producer chose to join an association the handler could refuse to bargain with the association on his behalf for "good, sound economic reasons," though it could not refuse to do so simply because of his association membership. S. Rep. 474, *supra*, at 7.

S. 109 was passed by the Senate in the form reported out by the Committee on Agriculture and Forestry (113 Cong. Rec. 21411 (1967)). Senator Aiken, the bill's sponsor, briefly summarized it by saying (*ibid.*): "This bill * * * is designed to protect the agricultural producer's right to decide, free from improper pressures, whether or not he wishes to belong to a marketing or bargaining association."

The bill was referred to the House Committee on Agriculture (113 Cong. Rec. 21582 (1967)), which conducted its own hearings the following month. *Agricultural Fair*

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[14] 7 U.S.C. 2303(d), like the original Senate version, still only applies to prohibit handlers from offering "any * * * inducement or reward to a producer for *refusing to or ceasing to belong* to an association of producers" (emphasis added).

Trade Practices: Hearings on S. 109 Before the House Comm. on Agriculture, 90th Cong., 1st Sess. (1967) [hereinafter cited as *1967 House Hearings*]. At those hearings it seemed, in the words of one participant, "that the passengers [had] changed trains. The proponents of the original bill [were], to a very large degree, opponents of the amended bill. The opponents of the original bill [were] proponents of the present bill" (*id.* at 173) (statement of Walter R. Collett, Oregon-Washington Vegetable & Fruit Growers Association). Representatives of producers' associations objected repeatedly to the provisions granting producers a right to refrain from joining associations.[15] By contrast, a number of different groups that had urged inclusion of that right in the Senate bill expressed their satisfaction with the bill and reiterated their concerns with the original version.[16]

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[15] See, *e.g.*, *1967 House Housings* 66-67 (statement of Harry L. Graham, National Grange), 79 (statement of Tony T. Dechant, National Farmers Union), 89-90 (statement of Robert N. Hampton, National Council of Farmer Cooperatives), 109-110, 115-116 (statement of Ralph B. Bunje, California Canning Peach Association). See also *id.* at 125 (statement of Rep. Matsunaga). The Department of Agriculture, which had played a large part in incorporating those provisions in the Senate bill, changed its position and attacked them in the House. *Id.* at 8-10, 15-17, 26-28 (statements of John A. Baker and John C. Bagwell, USDA). See R. Torgerson, *Producer Power at the Bargaining Table: A Case Study of the Legislative Life of S. 109*, at 81-84, 156 (1970).

The American Farm Bureau, while noting the amendments made in the Senate, continued to support the bill nonetheless. *1967 House Hearings*, 39, 41-42 (statement of Allen A. Lauterbach). It suggested, however, that the phrase "free to join together or not to join together in cooperative associations" appearing in the findings and declaration of policy be changed to read "free to join together voluntarily in cooperative associations" (*id.* at 42). That suggestion was accepted by the House. See note 5, *supra*, and 7 U.S.C. 2301.

[16] See, *e.g.*, *1967 House Hearings* 36 (statement of Rep. Schwengel), 91-92 (statement of E. Clinton Stokes, Chamber of Commerce of the United States), 128 (statement of C.E. Connor, Independent Livestock Marketing Association), 135, 137 (statement of Edward Dunkelberger, National Canners Association), 148-149 (statement of Edward Brown Williams, National Association of Frozen Food Packers), 154-158 (statement of G. Ted Cameron, National Broiler Council), 168-169 (statement of Donald Wilber), 169-170 (statement of

As a result of its hearings the House Committee made a number of minor changes not relevant here. But it specifically rejected a proposal "to delete the application of any prohibited practices or sanctions to associations of producers * * *. The committee felt that in those limited instances where cooperative associations are covered, the application of the bill is both justified and in the interest of producers themselves." H.R. Rep. 824, 90th Cong., 1st Sess. 4-5 (1967). It also declined the invitation to delete the disclaimer provision, "since the scope of the bill embraced only the prohibited acts in section 4" (*id.* at 5).

After a compromise in the Committee on Rules, however, the House deleted the phrase "or association of producers" from the prohibited practices section of the bill. See 114 Cong. Rec. 7449 (1968). Representative Sisk, on behalf of the Rules Committee, explained the change (*id.* at 7464):

> Since the bill already makes clear that associations of producers are not excluded from the term "handler," this phrase is redundant and could be misconstrued as unfairly pointing the finger of accusation to associations of producers. This is not the intent; and while my amendments do not change the purpose or basic meaning of the bill, they make misinterpretation more difficult.

Representative Poage, Chairman of the House Committee on Agriculture, expressed a similar understanding of what the bill would do (114 Cong. Rec. 7451, 7452 (1968)):

> [W]e wanted to make this bill apply in both directions—to make of it a two-way street—to make of it a protector of the right of the producer to determine for himself whether he cared to or did not care to become a member of a cooperative.
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> We * * * would actually assure to any producer the right to belong or not to belong to a cooperative.
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> The only thing which the co-ops cannot do is to go out and coerce a nonmember into becoming a member of

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James A. Steele), 170-172 (statement of Paul L. Phillips, Tri-County Poultry Association).

> the co-op and thereby come under the legislation. That is the only thing which this bill does not permit.

See also *id.* at 7450 (remarks of Rep. Latta) ("the farmers of this Nation will still have the right * * * to say to an association, 'I do not want to join your association and you cannot force me into it' "). Among the reasons for preserving the producer's right not to join an association, according to Representative Latta, was that "[t]he fees being charged by these associations are no small matter to the farmer. * * * Some of these associations are assessing members 1 percent of [their] gross. That is $250 out of that farmer's pocket to belong to the association" (*ibid.*).

2.a. The Michigan Supreme Court believed that "[w]hile § 2303 makes it unlawful for a handler to coerce a producer to 'join or belong to' an association, it does not forbid a *state* from requiring exclusive representation of individual producers where a producer majority sees fit" (J.S. App. A10 (emphasis in original; footnote omitted)).[17] But all that the Michigan Act does is empower an association of producers—once it has attained the requisite size—to do what the federal Act forbids. A state may no more do this than it may empower other "handlers" to violate the terms of the federal Act. Michigan could not, for example, authorize food processors to make loans to farmers as an inducement for rejecting association membership (see 7 U.S.C. 2303(d)), even if most processors—and for that matter most farmers—found that course of action desirable.

One may find a useful analogy to Michigan's Act in the Louisiana "nonsigner" statute held to be preempted in *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384 (1951). The Miller-Tydings Act (ch. 690, 50 Stat. 693) interpreted in *Schwegmann Bros.* amended Section 1 of the Sherman Act, 15 U.S.C. 1, to provide that "nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale" of specified commodities, if

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[17] We assume that, in using the term "handler," the court meant to include an association. See 7 U.S.C. 2302(a); J.S. App. A5 n.7. Nothing on the face of the court's opinion expressly so indicates, however. See J.S. 16.

state law permits such agreements.[18] Louisiana went further. Its statute provided that once a distributor and retailer contracted to fix the resale price, other retailers of the same commodity who were "nonsigners" of the contract were also bound by the agreed-upon price. 341 U.S. at 386-387. This Court concluded that the state's law went beyond the voluntary price-fixing by contract or agreement permitted by the Miller-Tydings Act: "when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids" (341 U.S. at 389).

In this case the issue is whether the private conduct demanded by Michigan is forbidden by the AFPA, rather than by the Sherman Act. But the legislative history of the AFPA demonstrates that one of the reasons frequently advanced for making association membership voluntary was that compulsion could frustrate the policies expressed in the Sherman Act. See page 13 & note 11, *supra*. See generally, Note, *Trust Busting Down on the Farm: Narrowing the Scope of the Antitrust Exemptions for Agricultural Cooperatives*, 61 Va. L. Rev. 341 (1975). In this case Michigan's Act provides that if a sufficient number of producers join together and come to an agreement with handlers on the price (and other terms) at which their commodity will be sold, then producers who are nonsigners of the agreement are also bound. Mich. Comp. Laws § 290.713(1).[19] That is similar to Louisiana's requirement

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[18] The Miller-Tydings Act was amended after the decision in *Schwegmann Bros.* by the McGuire Act (ch. 745, §§ 1-2, 66 Stat. 631-632) to permit fair trade pricing of articles for retail sale. The McGuire Act in turn was repealed by the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801.

[19] We note that the Michigan Act, though it requires all producers in the bargaining unit to adhere to the price and other terms negotiated by an accredited association, neither requires that prices be fixed in all cases (rather, only when 50% of the producers, responsible for 50% of the quantity, agree among themselves), nor provides for any supervision of the prices agreed upon. Thus, it does not resemble those cases that fall within the state action exemption to the Sherman Act. Rather, it envisions a system of restraints on competition imposed by private parties with "state authorization, approval, encouragement, [or]

that once a retailer and a distributor come to an agreement on the resale price for their commodity, nonsigning retailers are bound to market at the same price. But as a number of witnesses pointed out during the passage of the AFPA:

> "[The] justification for the agricultural cooperative exemption [from the antitrust laws] is to allow the farmers to overcome exploitation and earn a reasonably competitive profit. Its purpose is not to allow a monopoly profit.
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> This also explains why it is important that membership in cooperatives be voluntary, that cooperatives not be permitted to coerce outsiders by shutting off their access to markets. This requirement not only protects the farmers' basic interest in freedom of association, but it also increases the likelihood that cooperatives will be able to earn competitive profits but unable to achieve monopoly profits."

1967 Senate Hearings 110 (statement of W.W. Holding III, American Cotton Shippers Association (quoting an address by Donald F. Turner, Assistant Attorney General, to the National Council of Fruit and Bargaining Cooperatives)); see also *id.* at 70 (statement of Edward Brown Williams, National Association of Frozen Food Packers); *1966 Senate Hearings* 136 (statement of A. Starke Taylor, Jr., Independent Cotton Industries Association).

Concern about frustrating the policies of the antitrust laws was only one of a number of reasons advanced for

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participation." *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 592-593 (1976) (footnotes omitted). Cf. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (price-fixing compelled by state law; prices set by private parties not supervised by the state); *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532 (5th Cir. 1983) (en banc), petition for cert. pending, No. 82-1922 (price-fixing authorized but not compelled by state law); *United States* v. *Title Insurance Rating Bureau, Inc.*, 700 F.2d 1247, 1253 (9th Cir. 1983), petition for cert. pending, No. 83-154.

Of course, unlike those cases, here federal law permits agricultural producers to join together voluntarily to set prices for marketing and bargaining quite apart from any provision in state law. See 7 U.S.C. 2301 *et seq.* (AFPA); 7 U.S.C. 291-292 (Capper-Volstead Act); 15 U.S.C. 17 (Clayton Act). Federal law does not, however, permit associations to bind nonmembers to the terms of their agreements.

securing to producers the right to negotiate individually with handlers. But Michigan's law could undermine other justifications for that right as well. For example, Section 13 of the Michigan Act (Mich. Comp. Laws § 270.713(1)) binds nonmember producers not only to the price negotiated by an accredited association, but also to its "[q]uality specifications," in the nonmember's dealings with handlers. One of the concerns frequently voiced by handlers about forced membership in an association, however, was that they would lose control over the quality of the product they purchased. A similar fear was expressed by some producers who felt that the quality of their products would bring a better return if they were able to remain independent. See pages 12-13 & notes 9-10, *supra*.

Another justification for stipulating that membership must be voluntary was the fear that compulsory membership could frustrate a desirable competition among cooperatives. See page 13 & note 12, *supra*. What effect the Michigan Act will have on such competition is difficult to predict, though it may not be negligible. In large part it will depend on how the state defines the appropriate bargaining units. That matter is addressed in Section 6 of the Act (Mich. Comp. Laws § 290.706); it directs the state Agricultural Marketing and Bargaining Board to define "the largest bargaining unit" possible consistent with seven criteria, only one of which is "[t]he wishes of the producers." Mich. Comp. Laws § 290.706(2)(f). See also *id.* § 290.712 (revocation of accreditation).

b. Appellees have also suggested that the Michigan Act does not frustrate the purposes of the AFPA because, while it requires exclusive representation and payment of dues, it does not insist that producers actually become members of an accredited association. Motion to Dismiss 4-6. But the AFPA does not simply forbid compelling producers to join an association (see 7 U.S.C. 2303(a)). It also prohibits an association (7 U.S.C. 2303(c)):

> To coerce or intimidate any producer to enter into, maintain, breach, cancel, or terminate a membership agreement or marketing contract with an association of producers or a contract with a handler * * *.

As the Senate report noted, the federal Act intended to leave an individual producer "free from improper pressure to interfere with his arrangements and dealings with handlers" (S. Rep. 474, *supra*, at 6). Whether or not a producer in the bargaining unit joins the association, he is bound under the Michigan Act—when dealing separately and individually with a handler—by the terms and conditions of the contract negotiated by the association with handlers (J.S. App. A6).

The requirement that nonmember producers also pay dues to an accredited association fares no better. As Representative Latta stated in the course of the House debates, one of the reasons for protecting producers' freedom to refrain from joining an association was to avoid imposing on the unwilling the obligation of paying fees that could amount to "1 percent of [a producer's] gross" (114 Cong. Rec. 7450 (1968)). With respect to the aims of the federal Act, it is difficult to avoid the conclusion that the requirements imposed by the State of Michigan are the "practical equivalent" of a requirement of formal membership. Cf. *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 743 (1963); *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 217 n.10 (1977). The only effective difference between members and nonmembers is that the latter do not participate in the association's decision-making process.

3. Appellants also argue that Congress in the federal Act intended "to protect a processor's right to deal individually with farmers" (J.S. 18), and that the Michigan Act conflicts with that right. It is true that Mich. Comp. Laws § 290.713(1) makes "[a]n accredited association * * * the exclusive representative of all producers in the bargaining unit for the purpose of bargaining with all handlers that purchase the agricultural commodity produced in the bargaining unit." And, as noted above, even producers who have not joined the association are bound "by all terms and conditions of the contract negotiated with handlers" (J.S. App. A6). Appellants contend that that requirement runs afoul of 7 U.S.C. 2304, which states:

> Disclaimer of intention to prohibit formal dealing
>
> Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in

> or contract with an association of producers, nor require a handler to deal with an association of producers.

The Michigan Supreme Court, by contrast, found that Section 2304 was nothing more than its caption suggests: a "[d]isclaimer of intention to prohibit normal dealing" (J.S. App. A8). "There is no logical nexus," the court said, "between a provision declaring 'this is what we did not do' and the conclusion that 'what we did not do, cannot therefore be done'" (*id.* at A7). It found this interpretation to be supported both by the prohibited practices section of the Act (7 U.S.C. 2303) and by the legislative history (J.S. App. A9-A14).

We doubt that the AFPA was intended, as appellants have argued (J.S. App. A7 (emphasis in original)), to strike "a careful balance" among "the conflicting interests of individual producers, processors, and associations[,]" and to create or protect "a *processor's* right to deal with the individual farmer of his choice." In addressing the matter of handler dealings with producers or associations, the Senate report simply stated (S. Rep. 474, *supra*, at 7):

> The bill does not prevent or require these actions and is not intended to do so. * * * [T]he proponents of the bill stated in their testimony that this was not the purpose * * *.
>
> * * * * *
>
> While the bill does not require a handler to deal with an association of producers, it certainly makes clear that farmers have a right to form such associations and should be protected in the exercise of this right. The fact is clear tha[t] an association of producers, which has obtained the voluntary membership of a large number of farmers[,] deserves respect and recognition by the handler of agricultural products.

If handlers can insist on dealing directly even with producers who have voluntarily appointed an association as their designated agent, it may be doubted whether the protections of the AFPA are in fact meaningful.

Moreover, the only portion of the federal Act clearly creating duties—and corresponding rights—is 7 U.S.C. 2303, which does nothing more than prohibit certain han-

dler practices. As the House report stated, "the scope of the bill embrace[s] only the prohibited acts in section 4" (H.R. Rep. 824, *supra*, at 5). See also 114 Cong. Rec. 7464 (1968) (remarks of Rep. Sisk) ("Certainly we want to avoid the interpretation that the legislation intends to encourage the circumvention of properly constituted marketing or bargaining associations.").[20]

In any event, this issue does not seem to present an independent ground for reversal of the Michigan Supreme Court's judgment. If nonmember producers may (consistently with the AFPA) be bound by the terms of contracts negotiated by an association, it is highly unlikely that the federal Act intended to grant handlers the right to insist that such terms be ignored. If, on the other hand, the AFPA permits any willing producer to remain aloof from an association and negotiate individually, the handlers' right invoked by appellants does not, as a practical matter, enlarge the class of suppliers with whom handlers may deal.

CONCLUSION

The judgment of the Michigan Supreme Court should be reversed.

Respectfully submitted.

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Solicitor General
KENNETH S. GELLER
Deputy Solicitor General
JOHN H. GARVEY
Assistant to the Solicitor General

NOVEMBER 1983

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[20] It may be that a different question is presented in cases where a handler has a preexisting contract with a producer, and the contract contemplates direct dealings between the handler and producer. See *Butz* v. *Lawson Milk Co.*, 386 F. Supp. at 238-240. The AFPA need not be understood to require a handler in such a case to deal under the contract with an association that the producer has unilaterally appointed as his agent.

(SHOW)

PROCEEDINGS AND ORDERS

CASE NBR 82-1-01577 ASX
SHORT TITLE MI Canners & Freezers Assn. DOCKETED: Mar 22 1983
VERSUS Agricultural Marketing

Date	Proceedings and Orders
Mar 22 1983	Statement as to jurisdiction filed.
Apr 18 1983	Motion of appellee MI Agricultural Coop. Mkg. to dismiss filed.
Apr 20 1983	DISTRIBUTED. May 12, 1983
Apr 21 1983	Motion of appellee State of Michigan to dismiss or affirm filed.
May 16 1983	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 19 1983	Reply brief of appellant MI Canners & Freezers Assn. filed.
Sep 22 1983	Brief amicus curiae of United States filed.
Sep 28 1983	REDISTRIBUTED. October 14, 1983
Oct 17 1983	PROBABLE JURISDICTION NOTED.
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Nov 18 1983	Motion of appellees for divided argument filed.
Nov 22 1983	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 28 1983	Motion of appellees for divided argument DENIED.
Nov 29 1983	Brief amicus curiae of United States filed.
Dec 1 1983	Brief amicus curiae of National Food Processors Assn. filed.
Dec 1 1983	Brief amicus curiae of American Frozen Food Institute filed.
Dec 1 1983	Brief of appellants MI Canners & Freezers Assn., et al. filed.
Dec 1 1983	Joint appendix filed.
Dec 5 1983	Motion of the Solicitor General for leave to participate in oral GRANTED.
Dec 27 1983	Record filed.
Dec 31 1983	Brief of appellee MI Agricultural Coop. Mkg. filed.
Dec 30 1983	Brief amicus curiae of American Farm Bureau Federation filed.
Dec 31 1983	Brief amici curiae of California Tomato Growers Assn., et al. filed.
Jan 3 1983	Brief of appellee Agricultural Marketing & Bargaining Board filed.
Feb 14 1984	SET FOR ARGUMENT. Monday, March 19, 1984. (2nd case)
Feb 15 1984	CIRCULATED.
Mar 10 1984	Reply brief of appellants MI Canners & Freezers Assn. filed.
Mar 19 1984	ARGUED.